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IN THE

Supreme Court of the United States

JUAN M. CRUZADO-LAUREANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a court of appeals reverses a criminal sentence, it remands the case to the district court for further sentencing proceedings because the district court is best situated to hear and decide in the first instance issues that bear on the appropriate sentence. The court of appeals has the option of explicitly restricting the scope of the district court's inquiry on resentencing, but in this case it did not. The question presented is whether a district court on remand for resentencing retains the discretion to hear issues and take evidence beyond the scope of the error addressed by the appellate court, where the appellate court has not expressly limited the district court's authority on remand.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the United States Court of Appeals for the First Circuit is published at 527 F.3d 231 and is reproduced in the appendix ("Pet. App.") at 1–17. This decision will be referred to as "*Cruzado III*." The United States Court of Appeals for the First Circuit has issued two previous published opinions in this case. The first, *United States v. Cruzado-Laureano*, 404 F.3d 470 (1st Cir. 2005) ("*Cruzado I*"), is reproduced at Pet. App. 18–62. The second, *United States v. Cruzado-Laureano*, 440 F.3d 44 (1st Cir. 2006) ("*Cruzado II*"), is reproduced at Pet. App. 63–76. The transcript of the district court's resentencing hearing, conducted on April 26, 2006, is reproduced at Pet. App. 77–117.

JURISDICTION

The United States Court of Appeals for the First Circuit filed its opinion on June 4, 2008. Mr. Cruzado sought and was granted an extension of time to file this petition until October 2, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The text of 28 U.S.C. § 2106 and 18 U.S.C. § 3553(a) are set out in the statutory appendix at Pet. App. 118–20.

STATEMENT OF THE CASE

The courts of appeals reverse sentences in hundreds of criminal cases every year. Just about every one of these cases presents the possibility on remand that either the defendant or the Government will ask the district court to consider facts, evidence, or argument relating to issues other than the ones that formed the basis of the appellate court's reversal. The circuits are hopelessly split over whether the district court has the power to consider such issues or evidence, where (as is almost invariably the case) the court of appeals does not expressly limit the district court's authority in the opinion reversing the sentence.

The issue has percolated for two decades. Every regional circuit has weighed in on the question, and staked out a position on one side or another, yielding a 7-5 split. The split is acknowledged, longstanding, and intractable. Only this Court can resolve it.

The Criminal Charges Against Mr. Cruzado

In 2001, Mr. Cruzado was elected mayor of Vega Alta, Puerto Rico. Pet. App. 19. While he was in office, the Government charged him with several crimes. *Id.* He was ultimately convicted of several counts of theft concerning programs receiving federal funds, witness tampering, extortion and attempted extortion, and money laundering. *See* 18 U.S.C. §§ 666, 1512, 1951, 1956; Pet. App. 19.

Many of the charges arose out of Mr. Cruzado's role as the chairman of a nonprofit organization in charge of preparations for a Puerto Rican Day Parade. Pet. App. 24–26. The Government alleged that he extorted or attempted to extort money from

several people, based on his request that the leftover funds be transferred to him so that he could return them to donors, as opposed to having the nonprofit return the funds directly to donors. Pet. App. 25–26. The Government alleged that instead of returning the funds, Mr. Cruzado deposited the money in bank accounts he controlled or cashed checks at a check-cashing business he previously owned. Pet. App. 26. The Government similarly alleged that he kept for himself funds that should have been returned to Vega Alta. Pet. App. 21. This conduct provided the basis for the Government's money laundering counts. *Id.* The Government also eventually charged Mr. Cruzado with witness tampering as a result of his contact with some of the witnesses who testified against him. Pet. App. 35.

The district court sentenced Mr. Cruzado to 63 months of imprisonment and 3 years of supervised release, at the top of the range permitted by the United States Sentencing Guidelines ("U.S.S.G."). Pet. App. 3. It also imposed a fine of $10,000, even though the Presentence Report ("PSR") reported that Mr. Cruzado did not have the resources with which to pay the fine. *See id.* Finally, the district court imposed restitution in the amount of $14,252, over Mr. Cruzado's objection and without conducting a hearing on restitution. *See id.*

The Three Appeals

This case bounced back and forth between the district court and the court of appeals for several years. This petition arises from the third appeal.

The First Appeal: Cruzado I. In the first appeal, Mr. Cruzado appealed both his conviction

and his sentence. *Id.* The First Circuit affirmed the conviction, but remanded the case for resentencing because the district court had used the incorrect version of the Guidelines. *Id.*

On remand, Mr. Cruzado objected to the PSR's calculation of the sentence range (63–78 months). Among other challenges, he claimed that the sentencing range should not be increased for "abuse of a position of trust" under U.S.S.G. § 2C1.1, because the range for the extortion charges already included this factor. Pet. App. 73–76. Thus, taking this factor into consideration again was impermissible double counting. Pet. App. 75–76. He contended that the appropriate sentencing range was 41 to 51 months. He likewise filed a motion detailing why restitution should not be imposed. Because the PSR itself had concluded that he did not have the ability to pay a fine, Mr. Cruzado presented no objections regarding a fine in advance of the sentencing.

Despite these objections and the recommendations of the PSR, the district court computed the sentencing range to be from 63 to 78 months, and sentenced Mr. Cruzado to 63 months. Pet. App. 3. The court once again imposed restitution in the same amount it had imposed earlier—$14,252. *Id.* The court also reimposed a fine of $10,000, even though the PSR documented that Mr. Cruzado could not pay the fine—and, indeed, he was proceeding in forma pauperis. *Id.*

The Second Appeal: Cruzado II. Mr. Cruzado again appealed his sentence, pressing the same points he had pressed before the district court. Pet.

App. 70–76. The First Circuit agreed with him and concluded that the increase in the sentencing range for abuse of a position of trust was erroneous because the factor was already included as part of the extortion offense. Pet. App. 73–76.

As to the fine, Mr. Cruzado argued that it was erroneously imposed because the PSR, the only document apparently considered by the sentencing court, had concluded that a fine was inappropriate. Further, Mr. Cruzado argued that the fine, as well as the term of supervised release, was an integral part of the punishment, and thus should be considered by the sentencing court again if the case was remanded. Mr. Cruzado also made a brief, but clear argument that restitution was improper. He specifically referenced the arguments presented to the district court in his briefing on this issue.

Instead of considering his arguments relating to the fine and restitution on the merits, the First Circuit concluded that these arguments were not sufficiently presented. Pet. App. 70 n.7. The First Circuit remanded again for resentencing, stating that "[t]he sentence imposed by the district court is ***vacated*** and the case is ***remanded*** for resentencing." Pet. App. 76. The language of the First Circuit's opinion did not suggest that the district court was simply to recalculate the sentence absent the abuse of a position of trust as a factor. Instead, it offered only the following direction: "In remanding the case, we do not intend to intimate that the length of the sentence should necessarily be changed; what matters is that the premise as to the Guideline range must be correct." *Id.*

On the second remand, Mr. Cruzado sought to present testimony from ten witnesses relating to various issues, ranging from restitution, to Mr. Cruzado's character, to whether Mr. Cruzado was a victim of malicious prosecution. All of these witnesses would have presented information Mr. Cruzado felt the district court "should take into consideration" when it determined how to sentence him.[1] Pet. App. 82–87.

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[1] Had the district court permitted, Mr. Cruzado would have presented testimony from: (1) the F.B.I. agent who handled the investigation to demonstrate a factual basis for malicious prosecution; (2) Dr. Gonzalez, to demonstrate the he was not the victim of extortion and never felt threatened by Mr. Cruzado, and to demonstrate Mr. Cruzado's character; (3) Mr. Angel Castillo, the head of the office of Municipal Affairs for Vega Alta, to demonstrate that no money was due to Vega Alta from Mr. Cruzado; (4) Mr. Orlando Ramirez, the former President of the Legislative Assembly of Vega Alta, also to demonstrate that no money was due to Vega Alta from Mr. Cruzado; (5) Mr. Jose Colon Garcia, former secretary and major of the City of Vega Alta; (6) Ms. Lillian Alonso to demonstrate that restitution was improper, that she did not feel extorted by Mr. Cruzado, and to testify regarding his character; (7) Mr. Benjamin Declet, the director of finance of Vega Alta, to demonstrate that Mr. Cruzado did not owe any money to Vega Alta; (8) Mrs. Marilyn Garcia, to testify as to Mr. Cruzado's character and the fact that he did not owe any money to Vega Alta; (9) Mr. Ernesto Ortega, to testify as to the fact that he asked Mr. Benjamin Declet to make a claim for restitution for Vega Alta; and (10) Mr. Manuel Saldaña, Comptroller of the Commonwealth of Puerto Rico, to testify regarding an audit of the finances of Vega Alta for the year 2001 that would show that Mr. Cruzado did not owe any money to Vega Alta.

The district court rejected virtually all the testimony proffered on the ground that the testimony related to issues that were "foreclosed." Pet. App. 88; *see also* Pet. App. 90 (stating that the court did not consider many of the issues that Mr. Cruzado wished to raise "open at this stage of the proceeding"). The court concluded that "[t]he only issue before the Court is where within the range of 51 to 63 I should proceed to sentence this defendant. Nothing else." Pet. App. 90. In sum, the district court felt constrained by First Circuit precedent that ordinarily prohibits a lower court from exercising its discretion to consider on remand an issue that was not the basis for the reversal. Pet. App. 6.

The court sentenced Mr. Cruzado to the top of the newly calculated sentencing range of 51 to 63 months. Pet. App. 4. The court likewise imposed the same fine and restitution, again without considering the fact that the PSR concluded that Mr. Cruzado lacked the ability to pay the fine and after refusing to hear the witnesses who would have testified that Mr. Cruzado did not owe money to Vega Alta in restitution. *Id.*

The Third Appeal: Cruzado III. Mr. Cruzado appealed to the First Circuit again. *Id.* Among other challenges to his sentence, Mr. Cruzado argued that the district court should have been permitted to hear issues unrelated to the recalculation of the sentencing range required by the last remand. Pet. App. 5–6. He acknowledged that First Circuit precedent authoritatively rejected this argument, but he was preserving the issue for this Court's review. Pet. App. 6. Mr. Cruzado discussed the

witnesses he had intended to call and the issues their testimony would have supported. Pet. App. 4.

The Court of Appeals adhered to its precedent that the district court lacked the authority to consider any issues not specifically addressed by the appellate decision remanding for resentencing. Pet. App. 6. Applying the precedent, the court concluded that it would have been improper for the district court to consider Mr. Cruzado's evidence regarding the various sentencing issues he sought to raise—including the propriety of the restitution and the fine, whether Mr. Cruzado had been subjected to malicious prosecution, and the impact of the crime on its victims. Pet. App. 6–8. The sole reason the Court of Appeals gave for putting those issues off limits was that the issues were "unrelated to the abuse-of-trust issue and had no relationship to the issue before the court on remand—the appropriate length of the sentence under the Guidelines." Pet. App. 7.

In so ruling the Court of Appeals acknowledged that its rule conflicts with decisions of other circuits. Pet. App. 6 ("Although some circuits do generally allow de novo resentencing on remand, . . . the First Circuit does not." (citing, as contrary authority, *United States v. Duso*, 42 F.3d 365, 368 (6th Cir. 1994); *United States v. Smith*, 930 F.2d 1450, 1456 (10th Cir. 1991))).

REASONS FOR GRANTING THE PETITION

The Court should grant this petition for three reasons. First, the question presented—regarding the default rule about the district court's power to

consider issues it determines to be relevant to resentencing—has left the circuits hopelessly split for two decades. *See infra* Point I. Second, this is an issue of national importance. It affects hundreds of cases each year, and the differential treatment of similarly situated criminal defendants violates the imperative to treat like defendants the same. *See infra* Point II. Third, the minority rule adopted by the First Circuit is wrong: It undermines the discretion due to the district court in sentencing decisions, which this Court has recognized is an area of institutional strength of the district court; it is inconsistent with statutory rules guiding that discretion; and it promotes ancillary litigation over what issues are sufficiently related to the error identified by the remanding court. *See infra* Point III.

I. THE COURTS OF APPEALS HAVE LONG BEEN HOPELESSLY SPLIT ON THE DEFAULT RULE ABOUT THE EXTENT OF A DISTRICT COURT'S DISCRETION IN RESENTENCING TO CONSIDER ISSUES OUTSIDE THE SCOPE OF THE REMANDING COURT'S OPINION.

Splits do not get any more intractable or mature than this one. Every regional circuit has addressed the question, and they have split 7-5. The majority rule is that a district court has authority to consider any issues not specifically foreclosed by the court of appeals' opinion when a case is remanded for resentencing. The minority rule is the one the First Circuit applied in this case, that a district court ordinarily lacks authority to consider any issues

other than those specifically made relevant by the court of appeals' decision even when the remanding court's opinion does not expressly restrict the lower court's authority. Courts have acknowledged the split, and have only become further entrenched over the course of two decades. Only this Court can resolve the dispute.

A. Seven Circuits Have Held That District Courts Have Authority to Consider Any Issue Not Specifically Foreclosed by the Remanding Court's Decision.

The majority of the courts of appeals have concluded that the district court may consider any issue not expressly foreclosed by the remanding court's opinion. That is the rule in seven circuits: the Second, Fourth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits.[2]

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[2] ***Second Circuit:*** *United States v. Atehortva*, 69 F.3d 679, 685 (2d Cir. 1995) (holding that, on resentencing, "the court was free to consider grounds for departure it had not contemplated in the first sentencing proceeding" because "the resentencing proceeding was appropriately treated as a de novo sentencing, for the remand did not specifically limit the scope of resentencing"); *United States v. Sanchez Solis*, 882 F.2d 693, 699 (2d Cir. 1989). ***Fourth Circuit:*** *United States v. Broughton-Jones*, 71 F.3d 1143, 1149 n.4 (4th Cir. 1995) (holding that unless specifically limited by the remanding court's mandate, resentencing may proceed *de novo*, "constrained only by the constitutional bar against vindictiveness" (citing *United States v. Bell*, 5 F.3d 64, 67 (4th Cir. 1993)). ***Sixth Circuit:*** *United States v. Jennings*, 83 F.3d 145, 151 (6th Cir. 1996) (holding that "[o]n remand, the only constraint under which the District Court must operate, for the purposes of resentencing, is the remand order itself. Where the

The rule dates back nearly two decades, when the Second Circuit confronted the issue in *Sanchez Solis*.

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remand does not limit the District Court's review, sentencing is to be *de novo*[, and a district court] err[s]" in refusing to consider issues raised by the defendant on resentencing); *United States v. Crouse*, 78 F.3d 1097, 1100 (6th Cir. 1996); *Duso*, 42 F.3d at 368 (resentencing is not limited unless "the remand [is] a limited one"); *United States v. Moored*, 38 F.3d 1419, 1422 (6th Cir. 1994) (stating that the district courts have "broad discretion . . . to reconsider sentencing factors on a sentencing remand"). ***Eighth Circuit:*** *United States v. Cornelius*, 968 F.2d 703, 705 (8th Cir. 1992) ("Once a sentence has been vacated or a finding related to sentencing has been reversed and the case has been remanded for resentencing, the district court can hear any relevant evidence on that issue that it could have heard at the first hearing." (citing *Smith* and *Sanchez Solis*)). ***Ninth Circuit:*** *United States v. Klump*, 57 F.3d 801, 803 (9th Cir. 1995) (holding that "[g]enerally, a court may take into account at resentencing 'any evidence relevant to sentencing'" and the "general rule" is "that resentencing is de novo" (quoting *United States v. Caterino*, 29 F.3d 1390, 1394 (9th Cir. 1994); other internal citation omitted); *United States v. Ponce*, 51 F.3d 820, 826 (9th Cir. 1995) ("On remand, the district court may consider any matter relevant to the sentencing. A district court may not, however, begin anew following a limited remand." (internal citations omitted)). ***Tenth Circuit:*** *United States v. Ortiz*, 25 F.3d 934, 935 (10th Cir. 1994) (absent a remand that is "narrowly confined" to specific issues, the district court has authority to hear "any relevant evidence the court could have heard at the first sentencing hearing"); *Smith*, 930 F.2d at 1456 (holding that when a sentence is vacated and remanded, "[s]uch an order directs the sentencing court to begin anew, so that 'fully *de novo* resentencing' is entirely appropriate"). ***Eleventh Circuit:*** *United States v. Cochran*, 883 F.2d 1012, 1017 (11th Cir. 1989) ("Once the court nullified the thirty year sentences, they were void in their entirety.... The district judge was free to reconstruct Cochran's punishment . . . .").

There, the rule redounded to the benefit of the *Government*, and not the defendant, for it was the *prosecution* that was seeking to introduce new information on remand. In remanding for resentencing, the Second Circuit anticipated and rejected the argument that the Government should be precluded from requesting that the district court consider new sentencing enhancements. The Second Circuit concluded that "in the interests of truth and fair sentencing a court should be able on a sentence remand to take new matter into account on behalf of either the Government or the defendant." 882 F.2d at 699.

Other courts have embellished on this logic in the intervening decades. The majority rule, courts have held, respects the "holistic nature of the trial judge's sentencing decision" and allows the district court to craft a "sentencing scheme which takes into consideration the total offense characteristics of a defendant's behavior." *United States v. Rosen*, 764 F.2d 763, 767 (11th Cir. 1985). The majority rule is a natural extension of the notion that post-sentencing conduct may be considered at resentencing because "the sentencing court [is] required to assess the defendant as he stood before the court at that time." *United States v. Green*, 152 F.3d 1202, 1207 (9th Cir. 1998) (internal quotation marks omitted).

In keeping with this philosophy, the courts that follow the majority rule presume that an appellate court's "practice is to vacate the entire sentence and remand for resentencing." *Ponce*, 51 F.3d at 826. Thus, "[s]ubsequent appellate panels presume that this general practice was followed unless there is

clear evidence to the contrary." *Id.* at 826 (internal quotation marks omitted).

In adopting the majority rule, the courts in the majority camp have rejected various arguments that recur when parties seek to limit the scope of the district court's authority on remand. First, they reject arguments grounded in prejudice: "The defendant is accorded the same procedural rights on resentencing as on the initial sentencing. Therefore, no prejudice results from the reconsideration of the sentencing factors under the guidelines." *Smith*, 930 F.2d at 1456 (internal citations omitted).

Second, they reject the argument that the law of the case doctrine limits the district court's authority on remand. This doctrine only "precludes revisitation of an issue where: (a) the issue was expressly or impliedly decided on appeal, or (b) the appellate court's mandate to the lower court is so narrow in scope as to preclude the district court from considering the issue." *Crouse*, 78 F.3d at 1100. Thus, as the Tenth Circuit has held, the doctrine is "inapposite, given this court's vacation of [the] initial sentence." *Smith*, 930 F.2d at 1456; *see also Crouse*, 78 F.3d at 1100 (holding that "the law of the case doctrine does not directly apply to resentencing").

Finally, courts have rejected the notion that the majority rule is overly favorable to defendants. It is just not fair to assert "that defendants who are granted departures based on post-sentencing behavior receive unfair treatment because they are 'lucky enough' to be resentenced. . . . [D]efendants who are resentenced are resentenced because they received illegal sentences, not because of some

random or fortuitous event." *Green*, 152 F.3d at 1207 (internal quotation marks omitted). Moreover, as the Sixth Circuit has explained, the defendant must take a "calculated risk" when deciding whether to appeal a sentence. Nothing prevents "a district judge from revisiting the entire sentencing procedure unless restricted by the remand order," thus an appeal may result in a "Pyrrhic victory" because a higher sentence could result. *Duso*, 42 F.3d at 368; *see also Atehortva*, 69 F.3d at 685–86 (noting that, when a defendant appeals his sentence, "the defendant assumes the risk of undoing the intricate knot of calculations should he succeed" and "[o]nce this knot is undone, the district court must sentence the defendant de novo and, if a more severe sentence results, vindictiveness will not be presumed"). And besides, as *Sanchez Solis* and other cases illustrate, the rule applies with equal force to the Government and the defendant alike.

B. Five Other Circuits Have Concluded That District Courts Lack the Discretion to Consider Any Issues Not Expressly Authorized by the Remanding Court's Opinion, Even Absent Specific Instructions From the Remanding Court Limiting the District Court's Authority.

Five other circuits have explicitly rejected the majority view, and held that a district court lacks discretion to address any issues not specifically authorized by the remanding court's opinion, even when the remanding court's mandate contains no

explicit limitation. This rule is applied in the First, Third, Fifth, Seventh, and D.C. Circuits.[3]

The Seventh Circuit was among the first to break with the majority rule. *See United States v. Polland*, 56 F.3d 776 (7th Cir. 1995). Previous Seventh Circuit precedent had "indicated that the vacation of a sentence results in a 'clean slate' and allows the district court to start from scratch." *Id.* at 777 (citing *United States v. Atkinson*, 979 F.2d 1219,

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[3] ***First Circuit:*** *United States v. Ticchiarelli*, 171 F.3d 24, 32 (1st Cir. 1999) (holding "that 'upon a resentencing occasioned by a remand, unless the court of appeals [has expressly directed otherwise], the district court may consider only such new arguments or new facts as are made newly relevant by the court of appeals' decision—whether by the reasoning or by the result'" (quoting *United States v. Whren*, 111 F.3d 956, 960 (D.C. Cir. 1997))). ***Third Circuit:*** *United States v. Giraldo*, 52 Fed. Appx. 584, 587–88 (3d Cir. 2002) ("Our decision, vacating the original sentence, pertained to the quantities of drugs attributable to Giraldo and did not breathe life into [issues not relating to drug quantity]. We agree with the District Court that, under the circumstances presented, Giraldo's [attempt to introduce new issues] came too late and, as a result, he waived his ability to [raise those issues]."). ***Fifth Circuit:*** *United States v. Marmolejo*, 139 F.3d 528, 531 (5th Cir. 1998) (holding that "[t]he only issues on remand properly before the district court are those issues arising out of the correction of the sentence ordered by this court. In short, the resentencing court can consider whatever this court directs—no more, no less"). ***Seventh Circuit:*** *United States v. Parker*, 101 F.3d 527, 528 (7th Cir. 1996) (Posner, J.). ***D.C. Circuit:*** *Whren*, 111 F.3d at 960 (holding "that upon a resentencing occasioned by a remand, . . . the district court may consider only such new arguments or new facts as are made newly relevant by the court of appeals' decision—whether by the reasoning or by the result").

1223 (7th Cir. 1992); *United States v. Barnes*, 948 F.2d 325, 330 (7th Cir. 1991)). But the court, in a seeming reversal of position, has since held that this would not be the norm in the Seventh Circuit. "[T]here may be occasions when justice requires, once we have found error, the district court to revisit *de novo* the entire sentencing calculus," the court opined. *Id.* at 778–79. But in most circumstances the district court's authority is limited. *Id.* Thus, in the Seventh Circuit, the rule is that "[i]f the [remanding court's] opinion identifies a discrete, particular error that can be corrected on remand without the need for a redetermination of other issues, the district court is limited to correcting that error," and all other issues should be considered waived. *Parker*, 101 F.3d at 528.

The Fifth Circuit, too, changed positions from the majority view to the minority. In an early case, the court criticized a district court that, upon resentencing, had limited the Government to information already in the record. The court opined, "We seek justice and truth and therefore do not preclude the introduction of information that is helpful in determining a proper sentence." *United States v. Kinder*, 980 F.2d 961, 963 (5th Cir. 1992). In keeping with this principle, the court held that "a district court may conduct an inquiry broad in scope, largely unlimited . . . as to the kind of information it may consider," and "should be able on a sentence remand to take new matter into account on behalf of either the government or the defendant" "[i]n the interest of truth and fair sentencing." *Id.* (internal quotation marks and citations omitted)

But just a few short years later, the Fifth Circuit reversed course: "This court specifically rejects the proposition that all resentencing hearings following a remand are to be conducted *de novo* unless expressly limited by the court in its order of remand." *Marmolejo*, 139 F.3d at 531. To the contrary, "[t]he only issues on remand properly before the district court are those issues arising out of the correction of the sentence ordered by this court. In short, the resentencing court can consider whatever this court directs—no more, no less." *Id.*

As a general matter, this minority position recognizes only two exceptions to this rule: (1) if "the court of appeals expressly directs otherwise," or (2) if the defendant raises a new "objection to the sentence [that] is based upon an error so plain that the district court or the court of appeals should have raised it for him." *Whren*, 111 F.3d at 960, 957; *see also Ticchiarelli*, 171 F.3d at 29 (exceptions for situations of "a blatant error that causes serious injustice" (internal quotation marks omitted)); *United States v. Stern*, 13 F.3d 489, 498 (1st Cir. 1994) (exception where a party has not had the opportunity to introduce evidence relevant to a "newly announced rule").

The circuits adopting the minority view have grappled with, and expressly rejected, the arguments in favor of the majority view. First, whereas the courts that subscribe to the majority view reject any notion that defendants who are resentenced should consider themselves "lucky," *Green*, 152 F.3d at 1207, the courts in the minority camp conclude that "[a] party cannot use the accident of a remand to raise in a second appeal an

issue that he could just as well have raised in the first appeal because the remand did not affect it," *Parker*, 101 F.3d at 528.

Second, the minority view is based on the concern that an alternative rule will encourage defendants to game the system: "*De novo* resentencing is in essence a license for the parties to introduce issues, arguments, and evidence that they should have introduced at the original sentencing hearing." *Whren*, 111 F.3d at 959–60. The minority, therefore, subscribes to a rule "requiring the parties to raise all relevant issues at the original sentencing hearing" on the basis of "equity and efficiency." *Id.* This position is in stark contrast to the majority view that "'front-loading'" of issues "would unnecessarily increase the burden on district courts and" the courts of appeals. *Jennings*, 83 F.3d at 151.

Third, in contrast to the majority view, some courts have supported the minority rule by invoking the law of the case doctrine, *see Ticchiarelli*, 171 F.3d at 28, or notions of waiver, *see Giraldo*, 52 Fed. Appx. at 587–88 ("under the circumstances presented," the defendant's attempt to introduce new issues "came too late and, as a result, he waived his ability to" raise those issues).

* * *

As is evident from the foregoing discussion, the courts of appeals are not only split, but they explicitly acknowledge the split, as the First Circuit did in this very case. Pet. App. 6 ("Although some circuits do generally allow de novo resentencing on remand, the First Circuit does not." (citing *Duso*, 42 F.3d at 368 and *Smith*, 930 F.2d at 1456)). As much

as a decade ago, the Fifth Circuit observed that "[t]he issue involving the scope of a remand for resentencing has caused a *significant split in the circuits.*" *Marmolejo*, 139 F.3d at 530 (emphasis added). Courts have identified (as this petition does) a "majority view among the circuits" and a "minority view." *Id.*; *see also Whren*, 111 F.3d at 959 (tallying up cases on either side of the split, before siding with the minority view). The Government, for its part, has "correctly assert[ed] that the *federal courts of appeals are divided* on the question of whether, following a remand after appeal, a defendant waives issues he could have but did not raise in a prior proceeding." *Giraldo*, 52 Fed. Appx. at 587 (emphasis added).

The split is longstanding, and it is intractable. The circuits are not going to realign and reach a unanimous view. Only this Court can bring uniformity.

II. THE ISSUE PRESENTED IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT IMPLICATES HUNDREDS OF CASES EACH YEAR.

Consistent treatment of similarly situated criminal defendants is one of the basic aspirations of this country's criminal justice system. *See* 18 U.S.C. § 3553(a)(6) (noting "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" as one of seven factors to be considered by a district court in imposing a sentence). Yet the split in the circuits on the issue of the scope of remand for resentencing undermines that aspiration by

subjecting similarly situated criminal defendants to different rules depending upon the circuit in which their case arises.

The courts of appeals hear thousands of criminal appeals each year. *See* Administrative Office of the United States Courts, *2007 Annual Report of the Director: Judicial Business of the United States Courts* at Table S-6 (2008) (reporting that the number of criminal appeals filed in the courts of appeals during the period of 2003 to 2007 ranged from 11,968 to 16,060). Virtually every criminal appeal involves a challenge to the sentence. *Id.* (reporting that the number of cases during the same period that challenged just the conviction ranged from 710 to 1,104). Both before and after *United States v. Booker*, 543 U.S. 220 (2005), the courts of appeals continue to hear thousands of appeals of sentences involving the U.S.S.G. each year. *2007 Annual Report of the Director* at Table S-6. And, although courts of appeals often affirm criminal appeals, last year alone the courts of appeals reversed or remanded over 850 criminal cases. *Id.* at Table B-5 (reporting that the courts of appeals collectively reversed or remanded 856 criminal cases during the 12-month period from September 2006 to September 2007).[4]

Every time a court of appeals remands a case for resentencing, the district court must assess the

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[4] A search of court of appeals opinions on Westlaw that include the terms "reverse" or "remand" and "resentence" in the digest, holding, or synopsis fields generated 858 results for the time period between January 2007 and September 2008.

extent of its power to conduct that resentencing. Thus, resolving the split among the circuits as to the scope of a district court's power on remand for resentencing would clarify the issue for district courts in hundreds of cases each year. The Court should grant this petition to provide adequate guidance on this novel and important question of federal law.

III. THE MINORITY RULE APPLIED BY THE FIRST CIRCUIT HERE NEEDLESSLY UNDERMINES THE DISCRETION THAT IS APPROPRIATELY EXERCISED BY THE DISTRICT COURTS IN CONDUCTING SENTENCING HEARINGS AND PROMOTES ANCILLARY LITIGATION REGARDING WHAT THE DISTRICT COURT MAY CONSIDER.

This Court should also grant review because the minority rule that the First Circuit followed in this case is fundamentally flawed.

First, the minority rule needlessly restricts the discretion of the district court on resentencing. This Court has increasingly recognized that the district court is in the best position to make determinations regarding appropriate sentencing. In *Booker*, this Court held that district courts may not be bound to follow the U.S.S.G. Instead, as an acknowledgement of the discretion that district courts exercise in fashioning an appropriate sentence, this Court concluded that the U.S.S.G. must be treated as "effectively advisory." 543 U.S. at 245. Courts of appeals, post-*Booker*, have the power to review the

decisions of district courts in this regard only for "reasonableness." *Id.*

Both *Booker* itself and the Court's subsequent opinion in *Kimbrough v. United States*, 128 S. Ct. 558 (2007), rested in part on an assessment of the institutional strengths of the district courts.

> The sentencing judge . . . has "greater familiarity with . . . the individual case and the individual defendant before him than the [United States Sentencing] Commission or the appeals court." He is therefore "in a superior position to find facts and judge their import under § 3553(a)" in each particular case.

Id. at 574–75 (internal citations omitted); *see also Koon v. United States*, 518 U.S. 81, 98 (1996) (noting that "[d]istrict courts have an institutional advantage over appellate courts" in sentencing).

The minority rule that automatically restricts a district court's discretion in resentencing, even without any explicit limitation by the remanding court, intrudes on an area of the district court's special expertise. The rule serves no useful purpose because, if the court of appeals concluded in any particular case that it was important for some reason to restrict the discretion of the district court, it could include specific instructions in its opinion. But the minority rule, by providing a default rule even absent specific instructions, restricts the district court's discretion in all cases automatically, whether or not that is appropriate. Thus, the courts of appeals that follow the minority rule, by expanding their own authority at the expense of the

district courts in an area in which the district courts are uniquely positioned to make superior decisions, have adopted a rule that is both in tension with the principles recognized in *Booker*, *Kimbrough*, and like cases and serves no useful purpose.

Second, the minority rule is also inconsistent with the text and policy of 18 U.S.C. § 3553(a). This section guides the discretion of the district court in fashioning an appropriate sentence designed to "reflect the seriousness of the offense, . . . promote respect for the law, . . . provide just punishment, . . . afford adequate deterrence, . . . protect the public . . . and . . . provide the defendant with needed" educational, vocational, or medical services. *Id.* § 3553(a)(2). Section 3553(a) requires a district court to consider several factors when sentencing, including "the nature and circumstances of the offense," "the history and characteristics of the defendant," and "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *Id.* § 3553(a)(1), (6).

By automatically cabining the district court's discretion on resentencing to only those issues made relevant by the remanding court's opinion, the minority rule is inconsistent with both the text and the purpose of § 3553(a). Section 3553(a) *requires* the district court to consider the enumerated factors in order to fashion an appropriate sentence. *Id.* § 3553(a) (stating that the district court "shall consider" the enumerated factors). As courts have recognized, some of these factors are not static. Factors like "the history and characteristics of the defendant" and "the need to avoid unwarranted

sentence disparities among defendants with similar records who have been found guilty of similar conduct" may change over time. *Id.* § 3553(a)(1), (6). The majority rule, in contrast, consistent with the statute, permits the district court to assess the factors in § 3553(a) at the time of the resentencing. Indeed, courts adopting the majority rule have specifically noted that it allows the district court to consider post-sentencing conduct. *Green*, 152 F.3d at 1207 (noting that post-sentencing conduct should be considered because "the sentencing court was required to assess the defendant as he stood before the court at that time" (internal quotation marks omitted)).

Third, the minority rule is likewise flawed because it promotes ancillary litigation regarding whether an issue is sufficiently related to the remanding court's decision to be addressed on resentencing. As this case and the others discussed above demonstrate, the minority rule promotes additional litigation regarding the scope of the district court's authority on remand as the parties and the courts struggle to determine what issues have been "made relevant" by the remanding court's opinion.

CONCLUSION

For each of these reasons, this Court should grant a writ of certiorari to review the Court of Appeals' judgment.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA, *Appellee* v. JUAN M. CRUZADO-LAUREANO, *Defendant, Appellant.*	No. 06-1815 D.C. No. 01-690 (JAF) OPINION

Appeal from the United States District Court
for the District of Puerto Rico
José Antonio Fusté, J., Presiding

Heard Nov. 8, 2007

Decided June 4, 2008

COUNSEL

Alexander Zeno, for appellant.
Thomas F. Klumper, Assistant United States Attorney, with whom Rosa Emilia Rodriguez-Velez, United States Attorney, and Nelson Pérez-Sosa, Assistant United States Attorney, were on brief, for appellee.

Before TORRUELLA, Circuit Judge, BALDOCK, Senior Circuit Judge, and LIPEZ, Circuit Judge.

OPINION

LIPEZ, Circuit Judge.

In two prior appeals to this court, appellant Juan Manuel Cruzado-Laureano ("Cruzado") successfully raised claims that required remand to the district court for recalculation of his sentence. A third sentencing hearing was held in April 2006, nearly four years after Cruzado was convicted on corruption-related charges. He now attempts a new round of challenges to his sixty-three month term of imprisonment and the related imposition of restitution and a fine. Finding no merit in any of these claims, we affirm all aspects of his sentence.

I.

The factual background of appellant's crimes was fully detailed in our two prior opinions. See *United States v. Cruzado-Laureano*, 440 F.3d 44, 45 (1st Cir. 2006) ("*Cruzado II*"); *United States v. Cruzado-Laureano*, 404 F.3d 470, 473–79 (1st Cir. 2005) ("*Cruzado I*"). It suffices to say here that Cruzado, the former mayor of Vega Alta, Puerto Rico, was convicted by a jury in June 2002 on charges of embezzlement, extortion, money laundering and

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Of the Tenth Circuit Court of Appeals, sitting by designation.

witness tampering stemming from conduct undertaken while he was in office, including demanding kickbacks on municipal contracts. The district court imposed a 63-month term of imprisonment and a $10,000 fine, and subsequently ordered Cruzado to pay restitution in the amount of $14,251.82.

In his first appeal, we rejected various challenges to his conviction, but remanded for resentencing because the district court had applied the wrong version of the Sentencing Guidelines. After a new calculation on remand, the court again imposed a 63-month term, which was the bottom of the new Guidelines range of 63–78 months, and reinstated the same fine and restitution amounts. See *Cruzado II*, 440 F.3d at 47. Cruzado filed a second appeal challenging the district court's application of several Guidelines provisions. We detected a single flaw-that the court erroneously had applied an enhancement for abuse of a position of public trust under U.S.S.G. § 3B1.3. *Id.* at 48–49. We therefore again remanded for resentencing, noting that "we do not intend to intimate that the length of the sentence should necessarily be changed." *Id.* at 50. We also stated that Cruzado's challenges to the district court's imposition of restitution, a fine and supervised release were "too perfunctory ... to permit us to evaluate the merits of those aspects of his punishment," citing our well established precedent that issues "'unaccompanied by some effort at developed argumentation[ ] are deemed waived,'" *Id.*

at 47 n. 7 (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)).

A third sentencing hearing was held on April 26, 2006. Cruzado and the government agreed on the criminal history category (I) and the total base offense level (24), which resulted in a Guidelines range of 51 to 63 months of imprisonment. Cruzado argued at the hearing that the district court could reconsider all aspects of his sentence, including restitution, because the appeals court had not explicitly limited the remand to a reassessment of the correct term of imprisonment without the abuse-of-trust enhancement. He also sought to present witnesses to prove that he was "actually innocent," that he had been subject to malicious prosecution, and that there were no victims of his crime-and hence no need for restitution-because no loss had occurred. The district court determined that it could consider only the appropriate sentence within the applicable Guidelines range. It agreed, however, to hear character testimony from four witnesses, and it allowed Cruzado to submit the questions his counsel had planned to ask of those witnesses and the five additional witnesses he had wanted to call. At the conclusion of the hearing, the court again imposed a 63-month term and also re-imposed the same restitution ($14,251.82) and fine ($10,000).

Cruzado has once again appealed his sentence, raising five claims of error: (1) the district court improperly refused to conduct a de novo hearing; (2) even if a full de novo resentencing was barred, the

court should have made new findings on the restitution and fine amounts because they are integral elements of every sentence; (3) the court impermissibly double-counted his lack of acceptance of responsibility; (4) appellant should have been allowed to present victim testimony in mitigation of his punishment; and (5) bias on the part of the sentencing judge denied appellant due process, requiring resentencing before a different judge. We briefly explain why each of these contentions fails.[1]

II.

A. Scope of Remand/Restitution and Fine

Appellant argues that the district court improperly limited the scope of his latest sentencing hearing to a decision on the appropriate term of imprisonment within the recalculated Guidelines range, which was

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[1] Although Cruzado has completed serving his term of imprisonment, this appeal has not become moot because of his challenges to the amounts of restitution and fine. See *Spencer v. Kemna*, 523 U.S. 1, 7, 118 S. Ct. 978, 140 L. Ed.2d 43 (1998) (holding that appeal of a conviction is rendered moot upon expiration of sentence unless defendant alleges some continuing "'collateral consequence'"); *United States v. Molak*, 276 F.3d 45, 48–49 (1st Cir. 2002) (noting that restitution order provides a pecuniary interest in the outcome of the appeal, avoiding mootness). In addition, if Cruzado were to succeed with a claim that his sentence was improperly calculated, his three-year period of supervised release could be reduced on remand. *See, e.g., United States v. Verdin*, 243 F.3d 1174, 1178 (9th Cir. 2001) (finding that defendant's sentencing appeal was not moot because, "[i]f he were to prevail ... he could be resentenced to a shorter period of supervised release").

corrected from 63-78 months to 51-63 months. Cruzado asserts that resentencings after remand should be conducted as de novo proceedings and that his entire sentence-including the amount of restitution-was therefore open to reconsideration. Although some circuits do generally allow de novo resentencing on remand, see, e.g., *United States v. Duso*, 42 F.3d 365, 368 (6th Cir. 1994); *United States v. Smith*, 930 F.2d 1450, 1456 (10th Cir. 1991), the First Circuit does not. In *United States v. Ticchiarelli*, 171 F.3d 24 (1st Cir. 1999), we held:

> "[U]pon a resentencing occasioned by a remand, unless the court of appeals [has expressly directed otherwise], the district court may consider only such new arguments or new facts as are made newly relevant by the court of appeals' decision-whether by the reasoning or by the result."

Id. at 32 (quoting *United States v. Whren*, 111 F.3d 956, 960 (D.C.Cir. 1997)).

Appellant acknowledges this precedent, which gives the panel remanding the case for resentencing the responsibility for altering the normal scope of the new sentencing hearing. Hence, he appears to concede that the issue of de novo resentencing is not, as a general principle, properly before us. See *Naser Jewelers, Inc. v. Concord*, 513 F.3d 27, 36 (1st Cir. 2008) (noting that a subsequent panel lacks power to overrule the decision of an earlier panel). The issue

is raised, he explains, to preserve it for en banc and Supreme Court review.

However, as a separate challenge, he contends that restitution and a fine are such "integral" parts of a sentence that, even in a remand limited to correcting the abuse-of-trust error, they are within the exception carved out in *Ticchiarelli* for matters "'made newly relevant by the court of appeals' decision.'" 171 F.3d at 32. In effect, he argues that whenever a court resentences a defendant, it must reconsider any related restitution and fine.

This attempt to avoid the holding in *Ticchiarelli* is unavailing in this case. Cruzado contested restitution at his second sentencing hearing and challenged both restitution and the fine in his prior appeal. However, as noted above, we deemed those challenges waived because the claims were inadequately developed. The need to correct the abuse-of-trust error has not given new merit to his opposition to those assessments. In this appeal, he argues that restitution was improper because no victim had a loss and that the fine was improper because he had no resources to pay it. These assertions are unrelated to the abuse-of-trust issue and had no relationship to the issue before the court on remand-the appropriate length of the sentence under the Guidelines. *See, e.g., United States v. Elizondo*, 475 F.3d 692, 697 (5th Cir. 2007) (holding that a remand for resentencing in light of *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L.

Ed.2d 621 (2005), did not re-open the issue of restitution).

Cruzado also suggests that, given the lower base offense level resulting from his second appeal, the district court should have considered imposing lower amounts of restitution and fine. However, defense counsel acknowledged at the sentencing hearing that the fine imposed, $10,000, was the lowest point of a range that went up to $500,000. The restitution order was based on specific findings of loss and not on Guidelines sentencing ranges. Because neither the amount of restitution nor the size of the fine was "'made newly relevant by the court of appeals' decision,'" appellant is not entitled to another opportunity to assert these claims. *Ticchiarelli*, 171 F.3d at 32 (quoting *Whren*, 111 F.3d at 960).

The district court therefore properly limited the scope of the latest sentencing hearing to consideration of the appropriate sentence within the applicable Guidelines range, and our review is likewise restricted to issues related to appellant's term of imprisonment.

B. Double Counting of Failure to Express Remorse

Appellant argues that the district court improperly considered his lack of remorse in deciding to re-impose a 63-month term of imprisonment, which had become the high end of the applicable Guidelines range after the court eliminated the erroneous two-

level enhancement for abuse of trust. At his previous sentencing, 63 months was the low end of the applicable range. Appellant contends that using his lack of remorse to justify a high-end sentence amounted to impermissible double-counting because his refusal to admit guilt already was taken into account when he did not receive a decrease in offense level for acceptance of responsibility under U.S.S.G. § 3E1.1.

This contention also is foreclosed by First Circuit precedent. In *United States v. Paz Uribe*, 891 F.2d 396, 400 (1st Cir. 1989), we rejected the appellant's claim that the district court erred by twice considering his failure to accept responsibility. The appellant had argued that improper double counting occurred when the court considered his denial of responsibility in sentencing him at the top of the applicable Guidelines range given that the range had been "premised on there being no acceptance of responsibility." *Id.* We noted that the district court has discretion to tailor a sentence to the individual defendant and the circumstances of his offense, and concluded that, "in the absence of an acceptance of responsibility," the court properly selected the high end of the Guidelines range "[d]ue to the substantial amount of cocaine involved." *Id.*

We thus recognized in *Paz Uribe* that lack of remorse may permissibly serve two different functions under the Guidelines: to disqualify a defendant from receiving a reduction in offense level for acceptance of responsibility and as a factor in

determining the defendant's particular sentence within the Guidelines range. The district court's ruling here also properly reflected that dual role. In explaining its choice of a sentence, the district court described appellant's offense as "serious" and "egregious," noted that his unlawful activity began "not even a year" after he had taken office as mayor, and pointed to his attempt to tamper with three potential witnesses during the investigation. The court also observed that, despite opportunities for appellant to express remorse, "sadly, he has failed to do so." The court concluded its review of the circumstances as follows:

> So where should I sentence the defendant under these circumstances? I do think if we are going to consider the seriousness of what happened in this case and we are going to consider the state of affairs in this case as of today, the only thing to do, the only proper thing to do would be to sentence him at the same level we sentenced him before, which is the 63 months.

In other words, the court did not "increase" his sentence based on lack of remorse, but instead chose the sentence from within the recommended range that it deemed most suited to the defendant and his conduct.

The court's consideration of appellant's attitude toward the crime, as well as the serious nature of the

offense, was appropriate under both the Guidelines and 18 U.S.C. § 3553(a), the statutory provision governing the imposition of a sentence. Guidelines § 1B1.4 provides:

> In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. *See* 18 U.S.C. § 3661.[2]

Section 3553 states that, "in determining the particular sentence to be imposed," the court shall consider "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). The statute also directs the court to consider, inter alia, "the need for the sentence imposed ... to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," *id.* § 3553(a)(2)(A), and the need "to protect the public from further crimes of the defendant," *id.* § 3553(a)(2)(C). Appellant's refusal to acknowledge that he committed criminal acts is information that

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[2] Section 3661 provides: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

falls well within both of these guiding provisions, giving relevant insight into his character and raising concerns about his respect for the law and his future conduct.

Appellant argues that, despite its seeming relevance, his lack of remorse is "prohibited by law" from being considered, *see* U.S.S.G. § 1B1.4, because reliance on his refusal to accept responsibility violates his constitutional right to maintain his innocence. We explicitly have rejected an equivalent argument-that the Guidelines provision allowing a reduction for acceptance of responsibility places the defendant "in the unconstitutional dilemma of abandoning his right not to incriminate himself or risking a higher sentence." *Paz Uribe*, 891 F.2d at 400; see also *United States v. De Jongh*, 937 F.2d 1, 5 (1st Cir. 1991). The constitutional argument is no more persuasive here. "[N]ot every burden on a right or encouragement to waive a right is invalid," *Paz Uribe*, 891 F.2d at 400, and it is well established that lack of remorse is a proper consideration in sentencing, *United States v. Johnson*, 903 F.2d 1084, 1090 (7th Cir. 1990) (citing cases). *See also United States v. Jahagirdar*, 466 F.3d 149, 157 (1st Cir. 2006) (noting district court's reliance on lack of remorse, among other factors, in upholding sentence as reasonable); *United States v. Thompson*, 476 F.2d 1196, 1201 (7th Cir. 1973) ("A show of lenience to those who exhibit contrition by admitting guilt does not carry a corollary that the Judge indulges a policy of penalizing those who elect to stand trial.").

Accordingly, we find no error in the court's reliance on lack of remorse among the factors it considered in setting appellant's sentence at the high end of the applicable Guidelines range.[3]

C. Mitigation Testimony

Appellant argues that the district court erred in restricting his presentation of testimony in mitigation of his punishment. He sought to present nine witnesses on various issues, including his innocence and the amount of restitution. Consistent with its ruling that the single issue before it was the

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[3] We note that the district court originally imposed a 63-month term of imprisonment at the first of appellant's three sentencing proceedings. At that time, the term was at the top of the Guidelines range the district thought applicable. At appellant's initial resentencing hearing, the government recommended that, even though 63 months was the *low* end of the correct range, the court "in all fairness, should go ahead and give him the minimum range of this guideline which is 63 months." The prosecutor observed that it would be unfair to impose a higher sentence as a result of his successful appeal. The court accepted that recommendation, stating that "it would be a material injustice to a defendant who has done nothing other than to exercise his constitutional right to an appeal and trial, ... to punish him for the fact that he ended up with a higher guideline." Thus, the record shows that the court has never viewed appellant as deserving a sentence at the low end of the applicable Guidelines range, having imposed a low-end sentence in the second sentencing hearing as a matter of fairness. Thus, the court's latest determination that the appropriate sentence is 63 months—which once again falls at the high end of the applicable range—does not indicate either a new or improper escalation in the court's perception of appellant's culpability or the appropriate penalty.

appropriate term of imprisonment, the court allowed testimony only about appellant's character.[4] Defendant called four witnesses, only two of whom turned out to know him personally. They testified that appellant was "a good citizen," that he was "very devoted to the municipality," that he was, in general, "a good person," and, "if he made any mistakes or infractions, perhaps it was lack of orientation." In addition, his attorney submitted the questions he had wanted to ask all nine witnesses as well as the outline of the argument he intended to make if he had been allowed to fully question the proposed witnesses. The court thus had ample insight into defendant's concerns. Cruzado also gave a lengthy allocution in which he asserted that the case against him was fabricated by the government. In support of his statement, the court allowed him to submit an audit report from the municipality.

In claiming that the court's limitations on witness testimony violated his right to allocution under Fed.R.Crim.P. 32, appellant primarily relies on inapposite case law concerning the rights of defendants in death penalty cases. Federal Rule of Criminal Procedure 32 does not give defendants the right to call witnesses in their behalf at sentencing. The rule only requires the court to allow the

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[4] Appellant argues that the amount of loss suffered by the victims was relevant to the determination of his sentence, as well as to restitution. However, testimony about loss at the sentencing hearing was unnecessary given that the court already had made a finding on loss in connection with the restitution order.

defendant and his attorney to speak. Fed.R.Crim.P. 32(i)(4)(A)(i), (ii);[5] *see United States v. Rodriguez*, 336 F.3d 67, 70 (1st Cir. 2003) ("It is a familiar rule that a criminal defendant, about to be sentenced, is not entitled to an evidentiary hearing on demand."); *United States v. Heller*, 797 F.2d 41, 43 (1st Cir. 1986) ("Although the defendant must be given the chance to inform the court of any mitigating circumstances, he does not have the right to have others testify for him at a sentencing."). In the context of this case, the district court was more than generous in giving appellant an opportunity to comment on the appropriate sentence through witness testimony, his own statement, counsel's argument, and the supporting documents. He was entitled to no more.

D. Judicial Bias

Appellant claims that he was denied due process at his resentencing hearing because the district judge was biased against him and should have disqualified himself. In support of this claim, appellant primarily relies on the district court's refusal to grant him bail pending the resentencing hearing, which was scheduled to occur after appellant already had been

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[5] Rule 32(i)(4) states, in relevant part:

(A) By a Party. Before imposing sentence, the court must:

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence....

incarcerated for more than 51 months-the low point of the applicable Guidelines range. Appellant asserts that the denial of bail "could mean only one thing-[the judge] already knew that he would impose a sentence above the time already served. Hence he was clearly biased." Appellant also cites the district court's rulings on the scope of the appeal, the presentation of mitigation evidence, and the appropriateness of considering his lack of acceptance of responsibility. In addition, he refers in a footnote to disciplinary proceedings against his counsel that were processed by the district judge in this case in his role as Chief Judge of the District, but that were initiated by two other judges.

These complaints do not remotely establish a due process violation. Recusal is required only when a judge's "impartiality might reasonably be questioned," 28 U.S.C. § 455(a), and judges should not "recuse themselves lightly," *United States v. Snyder*, 235 F.3d 42, 45 (1st Cir. 2000). *See also id.* at 46 ("[A] judge has a duty to recuse himself if his impartiality can reasonably be questioned; but otherwise, he has a duty to sit."). The court's denial of bail pending the hearing is an insufficient indicator of bias, given that the sentencing range went up to 63 months and a higher non-Guidelines sentence could have been imposed. The court was familiar with the case, having presided over the trial and twice previously sentenced appellant; it reasonably could have anticipated that appellant's new sentence would not be at the bottom of the range. *See In re United States*, 441 F.3d 44, 67 (1st

Cir. 2006) (noting "the principle that a judge's rulings and statements in the course of proceedings before him or her rarely provide a basis for recusal under § 455(a)").

Moreover, the court did not ignore the timing issue. It ordered appellant's expedited transfer to Puerto Rico so that the hearing could take place as soon as possible. In addition, as described above, the judge did not have a closed mind about the term of imprisonment and stated that he would have considered a lower sentence if appellant had expressed remorse. Finally, the fact that disciplinary complaints were filed by other judges against defense counsel is insufficient to taint a sentencing hearing that was, as we have discussed, properly conducted. *Cf. United States v. Mendoza*, 468 F.3d 1256, 1262 (10th Cir. 2006) (holding that judge's own referral of counsel for disciplinary review was not a basis for questioning judge's impartiality); *In re Cooper*, 821 F.2d 833, 838 (1st Cir. 1987) (per curiam) ("Generally, clashes between court and counsel are an insufficient basis for disqualification...."). We therefore reject appellant's contention that judicial bias caused a denial of his due process rights.

Affirmed.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,
Appellee

v.

JUAN M. CRUZADO-LAUREANO,
Defendant, Appellant.

No. 02–2658

D.C. No. 01–690 (JAF)

OPINION

Appeal from the United States District Court
for the District of Puerto Rico
José Antonio Fusté, J., Presiding

Heard March 11, 2005.
Decided April 5, 2005.

Before TORRUELLA, Circuit Judge, COFFIN,
Senior Circuit Judge, LIPEZ, Circuit Judge.

COUNSEL

Alexander Zeno for appellant.

Thomas Klumper, Assistant U.S. Attorney, with whom H.S. García, U.S. Attorney, and Nelson Pérez-Sosa, Assistant U.S. Attorney and Senior Appellate

Attorney, were on brief, for appellee.

OPINION

LIPEZ, Circuit Judge.

On January 8, 2001, Juan Manuel Cruzado Laureano, sometimes called "Manny" for short, took office as mayor of Vega Alta, one of Puerto Rico's municipalities. On January 25, 2002, a federal grand jury returned a superseding indictment that charged him with a number of crimes tied to abuse of his public office, including extortion, embezzlement, theft, money laundering, and witness tampering. After a fourteen-day trial, Cruzado was convicted of the following charges: one count of embezzlement from a program receiving federal funds, 18 U.S.C. § 666(a)(1)(A)(i) and (a)(1)(A)(ii); five counts of extortion, *id.*§ 1951(a); five counts of money laundering, *id.*§ 1956(a)(1)(B)(i) and (a)(1)(B)(ii); and one count of tampering with witnesses, *id.*§ 1512(b)(1) and (b)(2). The district court sentenced Cruzado to 63 months' imprisonment on all counts except for the witness tampering, for which Cruzado received 12 months. The sentences were to run concurrently with each other. In this appeal, Cruzado challenges the sufficiency of the evidence supporting his counts of conviction. He also argues that his sentence was erroneously calculated. Although we affirm the convictions, we vacate the sentence and remand for resentencing.

I.

We first provide a brief overview of the case, taking our information from the record as viewed in the light most favorable to the jury's verdict. *See United States v. Lara*, 181 F.3d 183, 190 (1st Cir. 1999). We reserve a fuller discussion of the facts for later sections to which they are particularly relevant.

After graduating from the University of Puerto Rico in 1969, Cruzado taught advanced mathematics at a local high school until 1976. At that point, he moved into the construction business. In 1992, he went into business with his then-wife, a pediatric dentist, who opened a medical practice, incorporated as Oficina Dental Las Colinas, Inc., often referred to by its acronym, Onaden, Inc. From 1992 to 1995, Cruzado handled routine administrative tasks for Onaden, including the opening of a bank account at a local branch of Banco Popular, which would later prove useful to his criminal endeavors. The account, in the name of Oficina Dental Las Colinas, Inc., with Cruzado as the only signatory, was used for such items as lease payments. When Cruzado became mayor, however, he did not disclose the account's existence as required by the Ethics Office for the Commonwealth of Puerto Rico.

From 1996 to 2000, Cruzado ran a check-cashing business, El Cajero Expresso. In November 2000, Cruzado was elected mayor of Vega Alta—his first try at running for public office—as a member of the Popular Democratic Party and was duly sworn into

office on January 8, 2001. Upon his election, Cruzado appears to have sold the check-cashing business to his oldest son, who took over day-to-day control. Cruzado, however, retained the last word in business affairs and kept control over the business's checking account.

Within a scant few weeks of becoming mayor, Cruzado began using his official position to embezzle and extort thousands of dollars from the municipality and from contractors who were working for the municipality; he then laundered the money in the Onaden bank account. We now describe the particulars of his criminal activity. (See the chart, attached as an appendix, for a summary of the charges and parties involved.)

A. Cristalería Vega Alta, Inc.

Cristalería Vega Alta is a firm that installs and repairs glass and aluminum doors. Cristalería's owner, Juan Cuevas Rodríguez, first got to know Cruzado through Cristalería's glass work for Cruzado's construction business. Shortly after Cruzado took office in January 2001, he embarked on an extensive program to renovate Vega Alta's city hall, which was in poor shape. Cruzado requested that Cristalería perform some locksmithing and remodeling work on the building, and he asked Cuevas for a price estimate. Cuevas quoted a price of $5,814. Cruzado then told Cuevas to add $2,000 to his quote and give the extra money to him. Fearing that he might be cut off from future work if he

disobeyed, Cuevas obliged.

Cristalería's contract provided that the company would be paid from a trust account of the municipality at Banco Santander, whose funds were reserved for making improvements to the city hall. For some reason, there was a delay in the disbursement of those funds. Cruzado spoke to Vega Alta's director of finance, Damien O. Colón Pabón, telling him that Cristalería was getting impatient about the delay and asking whether the municipality could expedite payment. Colón told Cruzado that the municipality's regular checking account might be faster, although disbursing funds from that account would require additional paperwork: price quotes, invoices, and various other papers. Also, when Banco Santander eventually made the disbursement from the trust account, that money would have to be put into the municipality's checking account.

Cruzado then informed Cuevas that, to be paid, he would need to procure some other, competing bids that were higher than Cristalería's. Cuevas complied: he approached two competing glass shops and told them to prepare fake bids that were higher than Cristalería's quote. They agreed to do so, even though they had no intention of submitting a formal bid for the work.

On April 4, 2001, the check from the trust account to pay Cristalería for its work was delivered to Cruzado's office. Colón requested that the mayor deposit the check into the municipality's checking

account. The mayor responded that Cristalería would be working for the municipality in the future, and that the check would be used to pay for that work. Colón criticized that plan, reaffirming that the check should go into Vega Alta's checking account and that, if Cristalería needed to be paid for new work, then a new contract should be drawn up and the disbursements could be made on that basis. Cruzado assured Colón that those formalities were not necessary; he would be responsible for retaining the check and making payments to Cristalería.

Cristalería was then paid twice for its work, receiving checks from both of Vega Alta's bank accounts. Specifically, on March 23, 2001, Cuevas picked up a check from city hall, drawn on the municipality's regular checking account, for the inflated price of $8,549 (minus a certain sum that Cuevas owed the municipality in licensing fees). Cuevas deposited that check in Cristalería's bank account. Then, on April 4, 2001, Cuevas received a visit in his office from Cruzado, who came bearing another check, this one also for $8,549 (again, minus certain immaterial deductions) drawn from the trust account. Cruzado told Cuevas to take the check, explaining that Cristalería would earn the double payment by doing more jobs for Vega Alta in the future. The next day, April 5, 2001, Cuevas issued two checks drawn on Cristalería's account, each for $2,000: one made out to "cash," and one made out to "Onaden, Inc.," according to Cruzado's instructions. Cruzado's chauffeur cashed the first check at the check-cashing business of Cruzado's son and gave

Cruzado the money, while Cruzado deposited the second check into the Onaden account at Banco Popular.

In early October 2001, Cruzado asked to meet with Cuevas, telling him he had something important to discuss. He claimed that he was being audited, and that he was nervous about the $2,000 check that Cuevas had issued to Onaden, Inc. Cruzado told Cuevas that, if asked about the check, he should say that it was a repayment of a loan extended to him by Cruzado before becoming mayor.

B. Sidney Travel and Tours, Inc.

In 2001, Vega Alta was celebrating its 225th anniversary and, at Cruzado's request, the organizers of the annual Puerto Rico Day Parade in New York were going to dedicate that year's parade to the town. As mayor, Cruzado formed a committee, called the Puerto Rico Day Parade Committee, to raise money and arrange for Vega Alta's delegation to travel to New York for the June parade. The committee, which was composed of governmental employees and representatives from local cultural groups, opened a checking account under the name "Centro Cultural de Vega Alta," which had two signatories, neither of whom was Cruzado. The Committee chose a local travel agency, Sidney Travel and Tours, to arrange for airplane tickets, ground transportation, and hotels. Cruzado was the only member of the committee who was handling lodging and hotel accommodations. Sidney Travel's

owner, Lilia Alonso Alvarez, had numerous contacts over the next few months with the committee while planning the trip to New York. Between April and June 2001, the committee raised about $160,000: $40,000 given by the municipality's assembly, the rest through private donations. Any money not needed for the trip was to be refunded to the municipality.

The committee put down an initial deposit with Sidney Travel to secure plane and hotel reservations. As the date of the parade neared and the travel arrangements assumed their final form, Alonso calculated that (1) the committee owed Sidney Travel $67,240.90; and (2) Sidney Travel owed the committee a refund of $14,816.74, which could be offset against the larger amount. Alonso informed the committee of her tally. On May 25, 2001, Cruzado arrived at Sidney Travel for a financial reckoning, bearing a blank check from Centro Cultural's account. He was alone. Instead of allowing Alonso to credit the entire $14,816.74 to the committee's account, Cruzado told her that he wanted part of the credit as a separate payment, which would be useful to him as food money for children who would be attending the parade. So instructed, Alonso made out a check for $5,816.74 to Onaden, Inc., and credited the remaining $9,000 to the committee's balance. The mayor then paid off the balance with a Centro Cultural check for $58,240.90. He later deposited the Onaden check into his private account.

In New York, Cruzado stayed at the Grand Hyatt Hotel, while most of Vega Alta's other parade attendees stayed at the Marriot Marquis. On June 11, 2001, the day after the parade, Cruzado sent a messenger to speak to Marilyn García, who served as one of the two signatories on Centro Cultural checks. Cruzado's message: he wanted three signed, blank checks drawn on the Centro Cultural account. García handed over the checks. Cruzado made out the first two checks to the Grand Hyatt; the third, he made out to Onaden, Inc., in the amount of $4,164. On July 3, 2001, that check was deposited in the Onaden account.

On July 6, 2001, after the trip was over, Sidney Travel made a final accounting. Again, a refund was due to the committee. Cruzado went to Sidney Travel himself and instructed Alonso to issue a check in the name of Onaden, Inc., for $8,174.80. Later, that check was deposited into Onaden's account.

On August 3, 2001, the Federal Bureau of Investigation spoke to Alonso about Cruzado's role in the committee's travel preparations. The next day, she informed Cruzado of the FBI's interest in his dealings. Cruzado then made out an Onaden check for $13,991.54 (the total of Sidney Travel's May 25 and July 6 checks to Onaden), dated it July 7, 2001, and deposited it into the Centro Cultural account on August 13, 2001.

C. Vega Alta Medical Hospital, Inc.

Like city hall, Vega Alta's local health clinic, the Centro de Diagnóstico y Tratamiento (CDT), needed renovations. Located throughout Puerto Rico, CDTs provide basic health care to local populations.[1] Shortly before the events of this case, Puerto Rico had privatized many CDTs. Vega Alta's CDT had been purchased by a partnership formed by two doctors: Luis González Bermúdez and Emilio Rivera Costas. The partnership was named Vega Alta Medical Hospital, Inc. The partners divided their responsibilities: Dr. González was the medical director, while Dr. Rivera was the administrator, handling tasks relating to maintenance, repair, and management. The partners had agreed with the municipality (although not in a written contract) that Vega Alta would provide two services—ambulance service, crucial to the CDT's functioning, as well as groundskeeping. Vega Alta had also agreed to donate an old, unused mobile health vehicle, which the CDT could repair and then use to provide health care to rural and outlying areas. Dr. González testified that the municipality was in charge of maintaining and fixing the CDT's physical facilities, as directed by Dr. Rivera.

Vega Alta's CDT also lacked air conditioning in the emergency room and administrative offices, a

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[1] Puerto Rican law defines a CDT as "an independent facility or one operated in conjunction with a hospital which provides community services for the diagnosis and treatment of ambulatory patients under the professional supervision of persons licensed to practice medicine, surgery or dentistry in Puerto Rico." 24 P.R. Laws Ann. § 331a(A)(4).

violation of Puerto Rico's health code. The doctors had been soliciting quotes from several air-conditioning businesses to remedy the problem. In January 2001, Cruzado visited the CDT for the first time, where he met with Dr. Rivera, who explained to him some of their problems. Cruzado said that he would send over a company, Martínez Air Conditioning, who had done some work for the municipality in the past, and that Dr. Rivera need not continue seeking bids. Cruzado also informed Dr. Rivera that Martínez Air Conditioning would install an air-conditioning unit in the CDT's dentistry office, located in a dilapidated and partially abandoned annex to the main building. Dr. Rivera protested that his priority was to get air conditioning for the emergency room, but Cruzado persisted.

Cruzado subsequently paid the CDT another visit to speak to Dr. González, Dr. Rivera's partner. The two men were alone. Cruzado explained that his political party was trying to raise money through donations. Feeling pressured by the mayor's authority and aware of the CDT's critical need for ambulance service from the municipality, Dr. González told him that he would contribute, even though Dr. González did not belong to the mayor's political party. At the time, however, Dr. González did not give the mayor any money.

Martínez Air Conditioning then arrived on the premises, installed the air conditioner in the dentistry office, and invoiced the CDT for $2,895, which the CDT did not immediately pay. Meanwhile,

Martínez sent an invoice to the municipality for the same amount, from which he received a check on May 4, 2001. Shortly thereafter, the mayor asked Martínez to remove the air conditioner from the CDT, for reasons known only to himself, and to take it to a nearby police station. Martínez did so, and was paid for his trouble with an $850 check from the municipality dated June 14, 2001.[2]

On July 10, 2001, Cruzado arrived at the CDT and asked for money from Dr. Rivera, who understood the payment to be related to the air conditioner (which, by then, had already been both installed and removed). Dr. Rivera testified that he knew nothing about the political contribution that Cruzado and Dr. González had discussed. Dr. Rivera asked for an invoice; Cruzado left for five or ten minutes and returned with an invoice for $5,000 on letterhead reading "Onaden, Inc." The invoice referred, however, to work performed by Martínez Air Conditioning.[3]

Dr. Rivera had a blank payroll check available that

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[2] The record does not disclose if the emergency room eventually got an air conditioner.

[3] We note that the CDT had already received one invoice from Martínez Air Conditioning. Apparently, the CDT had also received an invoice from the municipality for the same air conditioner. According to Dr. González, however, the municipality bore the ultimate responsibility for maintaining the CDT's physical facilities. Given the various invoices flying back and forth, the precise division of financial obligations between the CDT and the municipality for the cost of the air conditioner is unclear.

had already been signed by Dr. González. When Dr. Rivera called Dr. González to inform him of the impending payment, the two partners did not discuss the purpose of the payment. Dr. Rivera merely informed Dr. González that the mayor was there looking for money, and Dr. González said that paying him was fine. According to their testimony, Dr. Rivera understood the payment to be for the air conditioner, and Dr. González understood the payment to be the political contribution that he had discussed with the mayor earlier. Dr. Rivera then handed Cruzado a $5,000 check made out to Onaden.

Later in October, while being investigated by the FBI, Cruzado spoke to Dr. Rivera. Cruzado told Dr. Rivera to "tell the truth," which, according to Cruzado, was that the payment was a political donation. Dr. Rivera refused, saying that he would maintain that the payment was for the air conditioner, as evidenced by the invoice.

D. Ebanistería Familia

Ebanistería Familia is a woodworking shop in Vega Alta owned by Pedro A. Colón Muñoz, who knew Cruzado from patronizing his check-cashing business. During his mayoral campaign, Cruzado asked Colón for wooden poles to support advertising banners, which Colón provided free of charge. Soon after his election, Cruzado called Colón to city hall, where he explained that he wanted some glasswork and woodwork done in the lobby of the building, including seven wooden doors and some mahogany

cabinets. Colón took some measurements and quoted a price of $7,500. Cruzado then requested some additional work. On February 12, 2001, Colón gave Cruzado a written price quote for $9,200, which included the requested extra work. Colón testified that, typically, he requested a 50 percent deposit from customers before beginning work, which he uses to buy materials. He was told by Cruzado, however, that the municipality did not pay such deposits. Cruzado then offered to lend Colón the money from his son's check-cashing business. Colón went to El Cajero Expresso and received $5,200.

After Colón had begun the work, Cruzado told him to reduce the scope of the project, eliminating much of the extra work which would have raised the project cost to $9,200. Colón complied and eventuallyinstalled the woodwork at city hall. On April 4, 2001, Cruzado arrived at Colón's place of business bearing a $8,556 check ($9,200 minus 7 percent taxes), drawn on the municipality's trust fund at Banco Santander. Evidently, the municipality's payment had not been adjusted downward to account for the reduced work. Cruzado asked Colón to take the check and give the excess funds back in the form of a check payable to cash. Colón's wife, a certified public accountant who helped with the family business, later prepared a check payable to herself for $6,956 (the $5,200 loan plus the municipality's $1,756 overpayment), endorsed it, and gave the check to Colón. Colón dropped off the check, which was now as good as cash, at the check-cashing business of Cruzado's son.

The check was later cashed.

E. Premier Electrical and General Contractors, Inc.

Premier Electrical and General Contractors, Inc. (Premier Electrical), was owned by Juan Marrero Visalden, an electrician. On June 19, 2001, Marrero contracted with Vega Alta (Cruzado signed the contract) to build a local indoor basketball court, which would include cement foundations, bathrooms, a cafeteria, sidewalks, wiring work, and drainage. The base price for the project was $293,000; with some additional items, the total price was $342,000. After signing the contract, Premier Electrical began work in June or July.

Cruzado paid occasional visits to the site, observing the work and making casual conversation with Marrero. On one visit in September, Cruzado asked Marrero for a $10,000 payment for the Centro Cultural de Vega Alta. Marrero, who testified that he felt "rather stunned" by the request. agreed to pay. When Marrero asked how he could contact Cruzado, the mayor gave Marrero his business card, on which he had written his cell phone number.

On September 28, 2001, Marrero issued a $10,000 check payable to "Centro Cultural de Vega Alta," drawn on Premier Electrical's account. By coincidence, that same day Cruzado showed up at the project site. When Marrero told him that the check was ready, however, the mayor told him to

prepare a different check payable to "cash." The mayor said that he needed the money to take care of some "problems" at the Centro Cultural. On October 15, 2001, Marrero followed those instructions, issued the new check, and gave it to the mayor at his office in city hall.

After Cruzado was arrested on October 24, Marrero discovered that the check had not been cashed yet. The next day, he ordered his bank to stop payment on it. Later, when Cruzado had posted bond, he paid another visit to the project site. Cruzado asked what Marrero had done with the check. When Marrero told him that he had stopped payment on it, Cruzado told him he had done, in Marrero's words, "a good job."

Later, when Cruzado was no longer mayor, he kept calling Marrero. For example, he informed Marrero that his company had won a bid that it had submitted to Vega Alta for improvements to a local baseball field. Marrero knew that he had won the bid but had yet to receive any official papers confirming that fact. In that conversation, Cruzado also asked him whether he had met with the FBI. When Marrero admitted that he had, Cruzado told him that he would have to call him back. Eventually, Marrero felt compelled to retain an attorney, who sent a letter to Cruzado asking that he stop calling and checking into Marrero's business affairs.

F. Mundo Construction, Inc.

Mundo Construction, Inc., owned by Luis A. Vargas López, did business under the name Ferretería Mundo as a construction company and hardware store. Like Colón, the owner of Ebanistería Familia, Vargas knew Cruzado from using his check-cashing business. Vargas, too, helped with Cruzado's mayoral campaign, setting up platforms for political rallies without charge. In September 2001, Cruzado took Vargas to a neighborhood in Vega Alta, where they discussed a possible construction project involving sidewalks, curbs, and drainage. Cruzado asked for a price quote from Vargas. A few days later, after taking some measurements, Vargas delivered a written estimate of $39,500 to the clerk's office at city hall. Vargas then received a telephone call from the mayor, who asked him to add $2,000 to his quote. Vargas refused, explaining that he was reluctant to pass the $40,000 mark in his bid.[4] Moreover, Vargas believed that Cruzado wanted the extra money for his private benefit. Consequently, Vargas refused to add $2,000 to his bid, and Cruzado then told him that the project would not be built because of a lack of funds. Cruzado was arrested shortly thereafter, and another contractor later completed most of the work that Cruzado and Vargas had discussed.

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[4] For contracts worth more than $40,000, prospective contractors had to satisfy more formal bidding requirements imposed by Vega Alta. It appears that the price for the total project was already over $40,000, having been divided, somewhat artificially, into one bid for the sidewalks and curbs-$39,500-and another bid for the drainage.

II.

Some time in 2001, the federal government began investigating Cruzado's conduct. During that investigation, Cruzado added to his troubles when he attempted to tamper with potential witnesses, the owners of Cristalería and Vega Alta Medical Hospital. The mayor was eventually indicted and arrested on October 24, 2001. Cruzado posted bond on November 2, 2001, and was released, whereupon he tampered with another potential witness, the owner of Premier Electrical.

On January 25, 2002, the grand jury returned a 14-count superseding indictment, charging Cruzado with the following offenses:

- Count 1: embezzlement, 18 U.S.C. § 666(a)(1)(A)(i) and (a)(1)(A)(ii);

- Counts 2, 4, 6, 12, 13, & 14: extortion, *id.*§ 1951(a);

- Counts 3, 5, 7, 8, 9 & 10: money laundering, *id.*§ 1956(a)(1)(B)(i) and 1956(a)(1)(B)(ii);

- Count 11: tampering with witnesses, *id.*§ 1512(b)(1) and 1512(b)(2).

These counts are listed on the chart attached as an appendix to this opinion, which shows how Cruzado's laundering counts all derive from money that he was charged with embezzling or extorting.

Trial began on May 20, 2002. The government used a combination of testimony from Cruzado's victims and acquaintances, along with documentary evidence of cancelled checks and the like, to build its case. After the government rested on May 28, Cruzado filed a motion for judgment of acquittal on counts 1, 4 through 10, and 11 (thereby declining to challenge counts 2, 3, 12, 13, and 14). That motion was denied.

In his defense, through the cross-examination of government witnesses and his own testimony, Cruzado tried to characterize some payments as political contributions; as for others, he stressed that they had been innocent mistakes and that he had eventually returned the money (he had returned some payments after the government had begun investigating his dealings). He also used character witnesses.

After Cruzado rested his case on June 5, he renewed his motion for judgment of acquittal, which the court granted as to count 10. On June 7, the jury found Cruzado guilty on all remaining counts except count 12, for which it returned a verdict of not guilty. On June 14, Cruzado filed a second motion for judgment of acquittal as to all remaining counts except 2, 3, 13, and 14, which the court denied on July 31, 2002. On November 8, 2002, Cruzado was sentenced to 63 months in prison for Counts 1 through 9, 13, and 14; and 1 year for Count 11, the terms to run concurrently. More than a year later, on November 24, 2003, the district court ordered Cruzado to pay restitution in the amount of $14,251.82 to Vega

Alta.[5] This appeal followed.

III.

We review de novo a district court's denial of a motion for judgment of acquittal under Fed.R.Crim.P. 29.[6] Our task is to decide "whether, after assaying all the evidence in the light most amiable to the government, and taking all reasonable inferences in its favor, a rational factfinder could find, beyond a reasonable doubt, that the prosecution successfully proved the essential elements of the crime." *United States v. O'Brien*, 14 F.3d 703, 706 (1st Cir. 1994); *see also United States v. Piper*, 298 F.3d 47, 59 (1st Cir. 2002). The government may satisfy its burden of proof "by either direct or circumstantial evidence, or by any combination thereof." *United States v. Gifford*, 17 F.3d 462, 467 (1st Cir. 1994). Moreover, we must "resolve all credibility disputes in the verdict's favor." *United States v. Taylor*, 54 F.3d 967, 974 (1st Cir. 1995). Ultimately, the court "need not believe that no verdict other than a guilty verdict could sensibly be reached, but must only satisfy itself that the guilty verdict finds support in a

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[5] The government told us at oral argument that the district court had not made any findings as to loss amounts. It apparently overlooked the district court's restitution order.

[6] Fed.R.Crim.P. 29(a) provides in part: "After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction."

plausible rendition of the record." *United States v. Gomez*, 255 F.3d 31, 35 (1st Cir. 2001) (citation and internal quotation marks omitted).

Those daunting hurdles apply to the counts that Cruzado contested below with a Rule 29 motion. He faces an even greater challenge on the counts that he did not so contest: counts 2, 3, 13, and 14. Cruzado's failure to move for judgment of acquittal on those counts means that he must show "clear and gross injustice" to prevail now.[7] *United States v. Hadfield*, 918 F.2d 987, 996 (1st Cir. 1990); *see also United States v. Lopez*, 380 F.3d 538, 547 (1st Cir. 2004). With those principles in mind, we assess the sufficiency of the evidence, beginning with Cruzado's unpreserved challenges.

A. Cruzado's unpreserved challenges

1. Three counts of extortion (Counts 2, 13, and 14)

To establish a violation of the Hobbs Act, 18 U.S.C. § 1951, the government must prove three elements beyond a reasonable doubt: (i) that the defendant induced someone to part with property; (ii) that the defendant knowingly and willfully did so by extortionate means; and (iii) that the extortionate transaction affected interstate commerce. *Id.* §

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[7] Although Cruzado failed to move the court for judgment of acquittal on count 12, the jury ultimately acquitted him of that charge.

1951(a).[8] "The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." *Id.* § 1951(b)(2).

Extortion by "fear" can mean fear of economic loss, including the possibility of lost business opportunities. *United States v. Bucci*, 839 F.2d 825, 827–28 (1st Cir. 1988); *see also United States v. Hathaway*, 534 F.2d 386, 396 (1st Cir. 1976). The government must "show that the victim believed that economic loss would result from his or her failure to comply with the alleged extortionist's terms, and that the circumstances ... rendered that fear reasonable." *Bucci*, 839 F.2d at 828; see also *United States v. Rivera Rangel*, 396 F.3d 476, 483 (1st Cir. 2005). Alternatively, to prove extortion under color of official right, "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Evans v. United States*, 504 U.S. 255, 268, 112 S. Ct. 1881, 119 L. Ed.2d 57 (1992).

a. Extortion of Cristalería (Count 2)

Count 2 charged that on April 5, 2001, Cruzado extorted money from Cuevas, Cristalería's owner, by

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[8] In 1946, Congress passed the Hobbs Act to amend the 1934 Anti-Racketeering Act. See Act of July 3, 1946, ch. 537, § 1(c), 60 Stat. 420. Rep. Hobbs introduced the bill that became law.

asking him to inflate his price quote by $2,000 for work that he was doing at city hall. After Cuevas was paid twice for the same work (one payment from the municipality's trust account, one from the city's regular checking account), Cuevas paid Cruzado $4,000.

Cruzado first stresses that the only evidence as to Cruzado's reason for requesting an extra $2,000 was Cuevas's testimony, which he assails as "speculative." Next, he claims that Cuevas never gave him the money. Finally, Cruzado makes the curious argument that what really happened was theft, not extortion, because the money did not truly belong to Cuevas but to the municipality: "In order for there to be extortion the money must have belonged to Mr. Cuevas. However, the money they shared belonged to the municipality."

Cruzado's first two arguments reduce to a simple credibility dispute: Cuevas's account supports the conviction, while Cruzado's does not. Appellate courts, however, are wisely reluctant to "second-guess" a jury's credibility determination. *United States v. Carroll*, 105 F.3d 740, 743 (1st Cir. 1997); *see also United States v. Laboy-Delgado*, 84 F.3d 22, 27 (1st Cir. 1996). In the context of a sufficiency challenge, moreover, we are bound to "resolve all credibility disputes in the verdict's favor." *Taylor*, 54 F.3d at 974. A reasonable jury could have rejected Cruzado's self-serving testimony, finding instead that Cuevas was telling the truth.

Cruzado's third argument—that the money was not legitimately Cuevas's to begin with—also fails. The statute does not require that a victim of extortion part with his own property. Indeed, "a defendant's claim of right to the property is irrelevant. One may be found guilty of extortion even for obtaining one's own property." *United States v. Sturman*, 49 F.3d 1275, 1284 (7th Cir. 1995). To be sure, the rightful owner of the $4,000 was the municipality, not Cuevas; it was paying for work that it had not received. Still, a reasonable jury could have found beyond a reasonable doubt that the mayor induced Cuevas to part with the money when Cuevas had actual possession over the property—actual possession being "the state of immediate, hands-on physical possession." *United States v. Zavala Maldonado*, 23 F.3d 4, 6 (1st Cir. 1994). Cuevas had deposited one of Vega Alta's checks into his bank account and had cashed the other; it was solely because of the mayor's actions that he relinquished control over that money.

b. Attempted extortion of Premier Electrical (Count 13)

Premier Electrical's owner, Marrero, had contracted with the municipality to build an indoor basketball court. Cruzado asked him for $10,000, supposedly on behalf of the Puerto Rico Day Parade Committee, which was having unspecified "problems." Ultimately, Marrero gave the mayor a check payable to "cash" but was able to stop payment after Cruzado was arrested.

Cruzado argues that he requested the $10,000 as a political donation to Centro Cultural, "an entity controlled by his party." He thereby tries to use the requirement that a specific *quid pro quo* is necessary for conviction under the Hobbs Act when an official receives a political contribution. *See McCormick v. United States*, 500 U.S. 257, 273, 111 S. Ct. 1807, 114 L. Ed.2d 307 (1991) (official is guilty of extortion "if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act"). Here, Cruzado avers that he promised nothing specific in return for accepting the "contribution," and that therefore a reasonable jury could not have found him guilty.

This argument leads nowhere. Although Cruzado asserts that the payment was a political contribution, he does not point to any evidence showing that Centro Cultural was a political body or had anything to do with his political campaign. In fact, Centro Cultural was not under the control of Cruzado's political party or of any political party. While the committee had a number of governmental representatives on it, there was no testimony that they were members of a particular party. Moreover, the governmental representatives were outnumbered on the committee by members of other cultural groups, which belies the idea that the committee was "controlled" by Cruzado's party.

Finally, according to the testimony of Premier Electrical's owner, Cruzado requested in the end that the check be made out to "cash," not "Centro

Cultural." A reasonable jury could have inferred that Cruzado intended not to use the money for anything related to the committee's activities (especially because the committee was formed specifically for the Puerto Rico Day Parade, then more than three months in the past), and that Cruzado intended to cash the check and take the money for himself. The jury could have further inferred from Marrero's testimony that, if he did not pay Cruzado, the mayor would use his official power to punish Marrero in the future by withholding city business.

c. Extortion of Mundo Construction (Count 14)

Like Cristalería, Mundo Construction was a prospective contractor with the municipality. Its owner, Vargas, knew Cruzado from his check-cashing business and had donated free supplies to his political campaign. As he did with Cristalería's owner, Cruzado asked Vargas to pad his price quote with an extra $2,000, without explaining the purpose of the extra money. Vargas understood, however, that the money was for the mayor's private benefit. When Vargas refused to pay, Cruzado suddenly told him that there was no money after all for the project to build sidewalks, curbs, and drainage.

Cruzado assails this conviction as being based on sheer speculation as to his intent. It is true that, in this instance, the jury did not have the benefit of following the transaction through to completion, with the victim's checks deposited in the Onaden

account (as with Cristalería). However, the jury was well within its rights to believe Vargas's testimony and to find that Cruzado canceled the project (which was later built by someone else) as a reprisal for Vargas's refusal to submit to his demands for money.

2. One count of laundering money from Cristalería (Count 3)

Cruzado received two $2,000 checks from Cristaleria: one payable to "cash," and one payable to "Onaden, Inc." His chauffeur cashed the first at the check-cashing business of Cruzado's son; the second was deposited into Cruzado's private account.

To convict Cruzado of this offense, the government had to prove four elements beyond a reasonable doubt: (1) that Cruzado knowingly conducted a "financial transaction," (2) that he knew the transaction involved funds that were the proceeds of some form of unlawful activity, (3) that the funds involved were in fact the proceeds of a "specified unlawful activity," and (4) that Cruzado engaged in the financial transaction knowing that it was designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds of such unlawful activity. *See* 18 U.S.C. § 1956(a)(1)(B)(i); *United States v. Cornier-Ortiz*, 361 F.3d 29, 37 (1st Cir. 2004); *United States v. Martínez-Medina*, 279 F.3d 105, 115 (1st Cir. 2002). A conviction requires evidence of intent to disguise or conceal the transaction, whether from direct evidence, like the defendant's own statements, or

from circumstantial evidence, like the use of a third party to disguise the true owner, or unusual secrecy. *See United States v. Castro-Lara*, 970 F.2d 976, 981 (1st Cir. 1992) ("[C]ircumstantial evidence, in and of itself, is often enough to ground a conviction."); *see also Bourjaily v. United States*, 483 U.S. 171, 179–80, 107 S. Ct. 2775, 97 L. Ed.2d 144 (1987) ("[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it.").

Cruzado essentially challenges only the fourth element, intent to conceal. In his view, merely depositing his ill-gotten gains in the account of Oficina Dental Las Colinas, Inc., hardly signifies an intent to conceal. Cruzado was well known all over Vega Alta as the mayor and as a prominent citizen, and, according to him, no rational jury could conclude that Cruzado was trying to conceal the source of the money by depositing it in a bank where everyone knew him and knew his sources of income.

We are, to say the least, unconvinced by this argument. Cruzado deposited these funds, as he did with the other sums he acquired, in an account in the name of his then-wife's former dental practice, for which he was the only signatory, and which he failed to report upon being elected mayor. No one else knew of the account. Every witness asked about the account testified that he or she had never heard of "Onaden," but assumed that it was legitimate on the mayor's authority. A reasonable jury could easily have concluded that Cruzado intended to conceal the

money there and use it for his own private purposes. We see no "clear and gross injustice" in this conviction. *Hadfield*, 918 F.2d at 996.

B. Cruzado's preserved challenges

1. One count of embezzlement or theft of more than $5,000 from Vega Alta (count 1)

To convict Cruzado on this count, the government had to prove three elements beyond a reasonable doubt: (i) that Cruzado was "an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof;" (ii) that Cruzado embezzled, stole, obtained by fraud, or converted or intentionally misapplied property "valued at $5,000 or more" from "such organization, government, or agency;" and (iii) that such "organization, government, or agency receives, in any one year period [federal funds] in excess of $10,000." 18 U.S.C. § 666(a) and (b). Theft can be committed in a variety of ways under § 666. "The first four prohibitions cover any possibility of taking money for one's own use or benefit. Intentional misapplication, in order to avoid redundancy, must mean intentional misapplication for otherwise legitimate purposes; if it were for illegitimate purposes, it would be covered by the prohibitions against embezzlement, stealing, obtaining by fraud, or conversion." *United States v. Urlacher*, 979 F.2d 935, 938 (2d Cir. 1992) (quoted in *United States v. Cornier-Ortiz*, 361 F.3d 29, 36–37 (1st Cir. 2004)). The total value of funds stolen can be aggregated to

satisfy the $5,000 minimum that triggers criminal liability under § 666. *United States v. Sanderson*, 966 F.2d 184, 189 (6th Cir. 1992).

Cruzado concedes on appeal that he was an agent of a local government—namely, the mayor of Vega Alta—which received $10,000 or more in federal funds within a one-year period. He maintains, however, that the government failed to present sufficient evidence to allow a reasonable jury to conclude that he embezzled or stole more than $5,000 from Vega Alta. Without explanation, Cruzado limits his possible wrongdoing to two transactions: (1) Centro Cultural's $4,165 check to Onaden, which Cruzado wrote while in New York at the Puerto Rico Day Parade; and (2) the $1,756 check made out to "cash," which he obtained from Ebanistería Familia's owner, Colón, and which represented an overpayment from Vega Alta for work that Colón had not done.

Cruzado argues that, first, he spent the $4,165 on expenses related to the trip to New York. Even if he had not, however, the money belonged not to the municipality but to the parade committee, which had received it from Vega Alta with "no strings attached." Therefore, if Cruzado stole any money, he did so from the committee, not Vega Alta. Second, Cruzado maintains that Colón owed him the $1,756 as interest on the money that Colón had borrowed from him as an advance. As noted, after Cruzado claimed that the municipality would not pay a deposit on Colón's newly contracted job (as Colón's

other customers did), the mayor offered to provide a loan from his son's check-cashing business, El Cajero Expresso. Cruzado, in his words, "might be guilty of being a smart businessman and/or a usurer, but he was not being accused of usury."

The facts, when viewed in the light most favorable to the government, easily support Cruzado's conviction on this count. First of all, as the government points out, Cruzado neglects to consider other incidents besides the two he cites as possibilities. For example, there was the $4,000 that he instructed Cristalería's owner to skim from Vega Alta's double payment to him (one payment from Vega Alta's trust account, and one from its regular checking account). While arguing against the extortion conviction vis-à-vis Cristalería, Cruzado himself virtually concedes the theft by writing, "Clearly, the evidence of what occurred on April 5th, 2001, the time period when the crime occurred, points to theft of Municipal funds, not extortion." In addition, there were two more payments related to the trip to New York; in both cases, Cruzado intercepted reimbursements from Sidney Travel that were intended for the committee (and, ultimately, the municipality) and deposited them in his own bank account. Those two payments amounted to $13,991.54.

Even considering the two payments alone that Cruzado cites, a reasonable jury could have found beyond a reasonable doubt that Cruzado took them for his own private gain. First, there is no evidence that Cruzado spent the $4,165 while in New York; to

the contrary, that check was deposited into the Onaden account on July 3, several weeks after the trip had ended. Cruzado produced no receipts for the supposed expenditures.

His attempt to avoid the conviction by disputing that the municipality was the victim also fails. The parade committee, with Cruzado as its chairman, had agreed that any remaining funds would be given to the municipality. Furthermore, Vega Alta required an accounting of the funds received by the committee. A reasonable jury could have found that, by taking the $4,165, Cruzado was intercepting the money from being ultimately reimbursed to the municipality and such an interception constituted theft under § 666.

A reasonable jury could also have disbelieved Cruzado's argument that the $1,756 that Cruzado took from Colón, Ebanistería Familia's owner, represented interest on a loan. Cruzado had no evidence for this interpretation besides his own self-serving testimony, while Colón testified that Cruzado had specifically requested that he receive the excess funds from Vega Alta's payment. Believing Cruzado's explanation would require a perfect coincidence between, on the one hand, the amount that Colón owed Cruzado in interest and, on the other, Vega Alta's overpayment to Colón. The jury could reasonably reject such an argument that "would elevate coincidence to an art form." *Lara*, 181 F.3d at 201.

2. Two counts of extortion

a. Extortion of Sidney Travel (Count 4)

Cruzado twice intercepted refunds that Sidney Travel owed to the committee (and, ultimately, to the municipality) and deposited them in his private bank account. First, on May 25, 2001, he went to Sidney Travel and told its owner, Alonso, that instead of issuing a check to the committee, she should issue a check payable to Onaden, which he claimed to need for food money for children who were traveling to New York. Alonso complied, issuing the check to a payee she had never heard of, in large part because of Cruzado's authority as the mayor. Second, on July 6, 2001, Cruzado again instructed Alonso to issue a check payable to Onaden, which he deposited in his private account. She complied again, largely for the same reasons.

Cruzado claims that he was not acting as a public official but only as the chairman of a non-profit organization which was unaffiliated with the municipality. Hence, the "under color of public office" element of extortion does not apply. Cruzado also argues that the money was due to the committee as a refund anyway. Cruzado was the authorized representative for the committee; Alonso knew that. Therefore, a rational jury could not conclude that Cruzado induced her to part with property for unlawful reasons, when he was merely asking her for a refund under the authority that he had. Finally, Cruzado argues that he returned the money

as soon as he could (which happened to be soon after the government opened its investigation); he notes that there was no deadline to return the money, and he should not be punished for the government's unexpectedly hasty actions.

These are specious arguments. First, Cruzado did not divest himself of his authority as mayor when he walked in the door of Sidney Travel, especially when his mission on behalf of the parade committee was so closely tied to the municipality itself; Cruzado was chairman because he was the mayor, the committee had several other government officials as members, and the committee's entire reason for being was the celebration of the municipality's 225th anniversary. A reasonable jury could have believed that Cruzado knew that his authority would allow him to obtain the refunds from Alonso, in return for his continued good graces and future business from the municipality.

Cruzado's other two arguments are easily dispatched. His argument that the money was owed to the committee anyway is simply question-begging. Of course the money was owed to the committee. Cruzado's criminal conduct relates to what happened to that money before it could get to the committee. Finally, Cruzado's argument that he returned the money (a point which he repeated throughout trial and on appeal) is little more than an implicit admission of guilt and a plea for leniency. The jury was entitled to accord little if any weight to such eleventh-hour maneuvers.

In short, Cruzado's mishmash of allegedly innocent mistakes and neutral explanations fails to convince us that a reasonable jury could not have found Cruzado guilty of extorting money from Sidney Travel.

b. Extortion of Vega Alta Medical Hospital (Count 6)

On July 10, 2001, after Cruzado had arrived at the CDT asking for money, Dr. Rivera gave the mayor a $5,000 check payable to Onaden. Dr. Rivera testified that he understood the payment to be for the air conditioner that had been installed in the CDT's dentistry office (at Cruzado's instruction), even though that air conditioner had by then been removed (again, at Cruzado's instruction). Dr. González, meanwhile, had earlier promised to give the mayor a $5,000 political contribution; he testified that he understood the July 10 payment to be for that purpose.

Cruzado repeats here his argument that what looks like extortion was in fact only a political contribution. To sustain a conviction under the Hobbs Act for political contributions, he stresses, requires showing that the public official promised a specific *quid pro quo, see McCormick*, 500 U.S. at 274, 111 S. Ct. 1807, and he did not promise anything. In support of his argument, he describes the two doctors' testimony as contradictory, resolving that supposed contradiction in favor of Dr. González's professed understanding that the $5,000

payment was a political contribution. Cruzado argues that Dr. Rivera would not have paid for an air conditioner on July 10 which had already been removed by June 14. In Cruzado's view, then, Dr. Rivera testified untruthfully, and the $5,000 check must have been a political contribution as testified to by the person who authorized the check, Dr. González.

A reasonable jury could have found beyond a reasonable doubt that, despite the past discussion between the mayor and Dr. González of a political contribution, Cruzado asked for a check made out to "Onaden" so that he could deposit the check in his own private bank account, and the doctors were too scared to refuse him. After all, they both testified to their critical dependence on the municipality for ambulance service. The jury could have further concluded that the sham invoice given to Dr. Rivera served to cover the illegal conduct initiated by Cruzado. The mystery of paying for an air conditioner that had already been removed from the CDT's premises only further buttresses such an inference. And Cruzado never explains what connection Onaden might have had to Cruzado's Popular Democratic Party, or why he gave Dr. Rivera an invoice for air-conditioning work in exchange for a political contribution.

3. Four counts of laundering money

Cruzado was convicted of laundering money derived from illegal transactions involving Sidney Travel

(counts 5 and 8), Centro Cultural (count 7), and Vega Alta Medical Hospital (count 9). Cruzado's argument here is the same as his argument for the count charging him with laundering money from Cristalería: no rational jury could conclude that Cruzado was trying to conceal the source of his money, when he was simply depositing the money in a bank where everyone knew him and knew his sources of income.

Our response, too, remains the same. A reasonable jury could easily have concluded that Cruzado was concealing these funds in the Onaden account, which was unknown to anyone else and for which he was the only signatory. That is a paradigm case of money laundering, and a reasonable jury was free to so find beyond a reasonable doubt.

4. One count of tampering with three potential witnesses (Count 11)[9]

To convict Cruzado on this count, the government had to prove beyond a reasonable doubt that he: (i) knowingly (ii) used intimidation, threatened, corruptly persuaded another person, or attempted to do so, or engaged in misleading conduct toward

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[9] Cruzado erroneously contends that the jury found him guilty of tampering with Lilia Alonso Alvarez (Sidney Travel's owner) in a telephone call on August 4, 2001; Milton Martínez Arroyo (owner of Martinez Air Conditioning) in late 2000 or early 2001; and Luis A. Vargas López (owner of Mundo Construction, Inc.) in a telephone call on December 9, 2001. The jury found him not guilty as to those incidents.

another person (iii) with intent to influence testimony (iv) in an official proceeding. 18 U.S.C. § 1512(b)(1). Trying to persuade a witness to give false testimony counts as "corruptly persuading" under § 1512(b). *United States v. Khatami*, 280 F.3d 907, 912–13 (9th Cir. 2002) (citing cases). However, "it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully." 18 U.S.C. § 1512(e) (2005) (formerly subsection (d)).

The jury found Cruzado guilty of tampering or attempting to tamper with the testimony of Cuevas (Cristalería's owner) on or about October 9, 2001; Drs. González and Rivera (owners of Vega Alta Medical Hospital, Inc.) on October 17, 2001; and Marrero (owner of Premier Electrical) in a telephone call on December 10, 2001.

Cruzado's argument is simple: all he did was urge witnesses to tell the truth, which is not a crime. According to the witnesses, Cruzado did ask that they tell the truth; however, his version of "the truth" that he urged upon them was anything but the truth. To Cuevas, Cruzado described the $4,000 as repayment of a loan extended to Cuevas before he became mayor. At first, Cuevas maintained that story in front of the FBI. He then changed his tune, admitting that the money was skimmed from the inflated bid he submitted to Vega Alta and the

double payment he received in return. As for the doctors, the jury was entitled to reject Cruzado's characterization of the $5,000 payment as a political contribution, and instead find that the doctors' need for the mayor's good graces induced them to hand over the money. Even with respect to Dr. Rivera's testimony—that he believed the money was for the air conditioner, as evidenced by the invoice he received (on Onaden letterhead)—the jury could have found that Cruzado was trying to persuade a witness to testify to something other than his true beliefs. Finally, the jury could have found that Cruzado's repeated calls to Marrero and his continued interest in Marrero's business affairs, which culminated in Marrero's hiring a lawyer to send a cease-and-desist letter, constituted tampering.

IV.

A. Choosing the correct guidelines manual

As a threshold matter, a sentencing court must first decide which edition of the sentencing guidelines to use. A defendant should be sentenced according to the guidelines in effect on the date of sentencing, unless "the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the ex post facto clause of the United States Constitution," in which case "the court shall use the Guidelines Manual in effect on the date that the offense of

conviction was committed." USSG § 1B1.11(b)(1).[10] Cruzado was sentenced on November 8, 2002, seven days after the November 1 effective date of the 2002 guidelines. Nevertheless, the PSR used a two-year-old edition of the guidelines, its only explanation being the flat assertion that the "2000 edition ... has been used in this case to comply with the provisions of Guidelines § 1B1.11(b)(1)." The district court followed the PSR's lead and sentenced Cruzado under the 2000 edition of the guidelines.

The PSR and the district court made a mistake, however, because Cruzado's last offense of conviction occurred on December 10, 2001, thereby making the 2001 guidelines—not 2000—the relevant comparison with the 2002 guidelines for ex post facto purposes. Even in a complex case like this one, involving conduct that occurred on dates implicating different versions of the manual, "it will not be necessary to compare more than two manuals to determine the applicable guideline range-the manual in effect *at the time the last offense of conviction was completed* and the manual in effect at the time of sentencing." *Id.*§ 1B1.11, cmt. background (emphasis added).

Count 11 charged Cruzado with, among other things,

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[10] The Constitutional prohibition against ex post facto laws, U.S. Const., art. I, § 9, cl. 3, requires that a defendant be sentenced under the guidelines in effect when he committed the offense, rather than those in effect at time of sentencing, where subsequent amendments would have increased his punishment. See *United States v. Colón-Muñoz*, 318 F.3d 348, 361 (1st Cir.2003).

unlawful conduct on December 10, 2001—tampering with the owner of Premier Electrical. Cruzado was convicted of that offense. December 10, 2001, was more than a month after the effective date of the guidelines' 2001 edition. Therefore, the comparison for ex post facto purposes is between the 2002 edition and the 2001 edition. As it turns out, the relevant sentencing guidelines did not change between those two years. Therefore, Cruzado is right that he should have been sentenced under the 2002 guidelines, and the court, misled by the PSR, plainly erred in applying the 2000 guidelines.

B. Reasons for remanding

Arguably, we could continue our analysis to see if Cruzado was prejudiced by the application of the 2000 guidelines. *See United States v. Sedoma*, 332 F.3d 20, 28 (1st Cir. 2003) (reviewing a sentence for plain error). That analysis might reveal that a sentence under the 2002 guidelines would involve the same guidelines range as the 2000 guidelines. On the other hand, Cruzado argues that he would receive a lower sentence under the 2002 guidelines, while the government and the district court believe that he would receive a higher sentence. For two reasons, however, we decline to undertake such an analysis here.

First, between the 2000 and 2002 editions, the sentencing commission introduced a major change in the way that sentences for money laundering are calculated. The 2000 guidelines simply gave a fixed

number as the base offense level for money laundering. The 2002 guidelines take a more complicated approach by incorporating the offense level of the underlying offense.[11] Sentencing under that new regime might involve factual disputes or legal issues which the district court has not yet had an opportunity to address. If we were to explore this uncharted territory ourselves, we, in effect, would be doing the sentencing rather than the district court. That is not an appropriate allocation of functions. *See Koon v. United States*, 518 U.S. 81, 98, 116 S. Ct. 2035, 135 L. Ed.2d 392 (1996) ("District courts have an institutional advantage over appellate courts" in some sentencing matters.); *United States v. Rivera*, 994 F.2d 942, 950 (1st Cir. 1993) (Breyer, C.J.) (referring to district courts' "institutional strength" as being able to "best understand the relation of the Guidelines to case-specific, detailed facts").

Second, after *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed.2d 621 (2005), the sentencing guidelines are now advisory rather than mandatory. *See also United States v. Antonakopoulos*, 399 F.3d 68 (1st Cir. 2005). That legal development injects even more uncertainty into an attempt by us to reconstruct a sentencing decision by the district court under the 2002

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[11] The laundering guideline says to use the "offense level for the underlying offense from which the laundered funds were derived, if (A) the defendant committed the underlying offense ...; and (B) the offense level for that offense can be determined." USSG § 2S1.1(a)(1). Both conditions are true for Cruzado.

guidelines. Therefore, we conclude that the most prudent course is to vacate the sentence and remand for resentencing under the correct edition of the guidelines.

V.

We ***AFFIRM*** Cruzado's convictions. We ***VACATE*** Cruzado's sentence and ***REMAND*** for further proceedings not inconsistent with this opinion.

Appendix

	Embezzlement & Theft	*Extortion*	*Laundering*[12]	*Tampering*
Count 1: 18 U.S.C. § 666(a)(1)(A)(i) and (a)(1)(A)(ii)	**Between Mar. 2001 & Jan. 25, 2002- stole more than $5,000 from Vega Alta**			
Count 2: *id.* § 1951(a)		**April 5, 2001: $4,000 from Cristalería**		
Count 3: *id.* 1956(a)(1)(B)(i) and (a)(1)(B)(ii)			**April 6, 2001: cashed one $2,000 check, deposited another $2,000 check fromCristalería**	
Count 4: *id.* § 1951(a)		**May 25 & July 6, 2001: $13,991.54 in refunds from SidneyTrave l**		

[12] Except where noted (i.e., count 10), all deposits were checks made payable to Onaden, Inc., and deposited into Cruzado's "Oficina Dental Las Colinas, Inc." account at Banco Popular, Vega Alta branch.

Count 5: *id.* § 1956(a)(1)(B)(i) and (a)(1)(B)(ii)		May 30, 2001 deposited $5,816.74 check from Sidney Travel	
Count 6: *id.* § 1951(a)	May 25 & July 6, 2001: $5,000 from Vega Alta MedicalHospital		
Count 7: *id.* § 1956(a)(1)(B)(i) and (a)(1)(B)(ii)		July 3, 2001:deposited $4,165 check from Centro Cultural	
Count 8: *id.* § 1956(a)(1)(B)(i) and (a)(1)(B)(ii)		July 9, 2001:deposited $8,174.80 check from Sidney Travel	
Count 9: *id.* § 1956(a)(1)(B)(i) and (a)(1)(B)(ii)		July 11, 2001 deposited $5,000 check from Vega Alta MedicalHospital	
Count 10 (later dismissed): *id.* § 1956(a)(1)(B)(i) and (a)(1)(B)(ii)		Sept. 25, 2001:deposited $3,788.51 check from Centro Cultural to "Cash" in "El CajeroExpresso" account	
Count 11: *id.* § 1512(b)(1) and (b)(2)			Between Aug. 2001 & Dec. 2001, tampered with owners of Cristalería, Vega Alta Medical hospital, & Premier Electrical (found not guilty of tampering with Sidney Travel, Martinez

		Air Conditioning, & MundoConstruction)
Count 12 (not guilty): *id.* **§ 1951(a)**	June & July 3, 2001: Cristaleria	
Count 13: *id.* **§ 1951(a)**	Between Sept. & Oct. 15, 2001 $10,000 from Premier Electrical	
Count 14: *id.* **§ 1951(a)**	Sept. & Oct. 2001: $2,000 from Mundo Construction	

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA, *Appellee* v. JUAN MANUEL CRUZADO-LAUREANO, a/k/a Manny, *Defendant, Appellant.*	No. 05-1822 D.C. No. 01-690 (JAF) OPINION

Appeal from the United States District Court
for the District of Puerto Rico
José Antonio Fusté, District Judge, Presiding

Heard Dec. 5, 2005
Decided March 14, 2006

Before BOUDIN, Chief Judge, STAHL, Senior Circuit Judge, and LYNCH, Circuit Judge.

Opinion by Senior Circuit JudgeStahl.

COUNSEL

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Attorney, with whom H.S. Garcia, United States Attorney, and Nelson Pérez-Sosa, Assistant United States Attorney, were on brief, for appellee.

OPINION

STAHL, Senior Circuit Judge.

In 2002, a jury convicted Juan Manuel Cruzado-Laureano, the former mayor of Vega Alta, Puerto Rico, on a broad slate of corruption-related charges. Through a variety of schemes, Cruzado extorted funds from government contractors and embezzled funds that belonged in the city coffers. Although we sustained his convictions in an earlier appeal, we vacated his sentence because it was imposed under the wrong version of the United States Sentencing Guidelines. After resentencing, Cruzado is back before us in this appeal, contesting the applicability of particular provisions of the Guidelines to the facts of his case. In large part, the district court acted properly in imposing Cruzado's sentence. However, we find that the district court impermissibly increased Cruzado's sentence on the basis of two provisions that dealt with his abuse of his elected office. We therefore vacate the sentence and once again remand for re-sentencing.

I. Background

This case comes to us on appeal for the second time. The facts of the case are laid out extensively in our prior opinion, *see United States v. Cruzado-Laureano*, 404 F.3d 470, 473–80 (1st Cir. 2005), and we need not rehearse them here in any great detail. Briefly put, Juan Manuel "Manny" Cruzado-Laureano has had a varied career. A high-school mathematics teacher for seven years early on in life, Cruzado later worked 16 years in the construction industry, four as an administrator in his wife's dental practice, and five as the owner and manager of a check-cashing business. In November 2000, Cruzado was elected mayor of Vega Alta, a municipality in Puerto Rico. Almost immediately after taking office, Cruzado began extorting and laundering money by, among other things, demanding kickbacks on municipal contracts and redirecting funds intended for the government into his own pocket. Cruzado would clear the extorted money through his own bank account, through his old check-cashing business (now owned by his son), or through the accounts at his wife's dental practice. The Federal Bureau of Investigation began investigating Cruzado's conduct in 2001, and an initial indictment was issued in October of that year. During the course of the investigation and after the initial indictment was handed down, Cruzado compounded his legal troubles by attempting to tamper with three potential witnesses against him.

A 14-count superseding indictment was returned on January 25, 2002. The indictment charged Cruzado with one count of embezzlement under 18 U.S.C. § 666(a)(1)(A)(i) and (a)(1)(A)(ii) (2000); six counts of extortion under § 1951(a); six counts of money laundering under § 1956(a)(1)(B)(i) and (a)(1)(B)(ii); and one count of tampering with a witness under § 1512(b)(1) and (b)(2). After the close of evidence, the court dismissed one of the money-laundering charges, and the jury eventually returned a verdict of not guilty on one of the extortion charges. Cruzado was convicted by the jury on each of the remaining twelve charges.

The district court imposed a 63-month sentence.[1] In his earlier appeal, Cruzado unsuccessfully challenged his conviction on a number of grounds not relevant here. Cruzado prevailed, however, on his claim that the district court applied the wrong version of the Sentencing Guidelines. The court had sentenced Cruzado under the 2000 edition of the Guidelines. We held that it ought to have relied on the 2002 Guidelines, and so vacated the sentence and remanded the case for resentencing. On remand, the court performed the sentencing calculation anew under the 2002 Guidelines.[2]

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[1] The court also imposed a one-year sentence for the witness-tampering charge, to run concurrently with the 63-month sentence imposed for the rest of the charges.

[2] The court imposed the new sentence after the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed.2d 621 (2005), which rendered the

Section 2C1.1 of the Guidelines provides sentencing guidance for "Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right," and § 2S1.1 for "Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity." Money laundering is, generally speaking, a derivative offense: money needs to be laundered because it was illegally derived. In recommending a sentence for money laundering under § 2S1.1, the Guidelines take as the base offense level the full computed offense level relevant to the underlying offense. In making its sentencing calculation, the district court proceeded by:

1) turning from the money laundering provision, § 2S1.1,[3] to the provision for the underlying offense, § 2C1.1;[4]

2) determining the base offense level for extortion offenses under § 2C1.1(a);

Guidelines advisory. It nevertheless imposed sentence based on the Guidelines recommendation.

[3] In the 2002 Guidelines Manual, § 2S1.1 read in relevant part: "Base Offense Level: ... The offense level for the underlying offense from which the laundered funds were derived ...,"§ 2S1.1(a)(1); "If the defendant was convicted under 18 U.S.C. § 1956, increase by 2 levels,"§ 2S1.1(b)(2)(B).

[4] In 2002, § 2C1.1 read in relevant part: "Base Offense Level: 10," § 2C1.1(a); "If the offense involved more than one bribe or extortion, increase by 2 levels,"§ 2C1.1(b)(1); "If the offense involved a payment for the purpose of influencing an elected official or any official holding a high-level decision-making or sensitive position, increase by 8 levels,"§ 2C1.1(b)(2)(B).

3) adjusting that level upward according to the rules for specific offense characteristics applicable under the extortion guideline, § 2C1.1(b);

4) taking the resulting final offense level for extortion as the base offense level for money laundering under § 2S1.1(a);

5) applying additional enhancements specified by the money laundering guideline under § 2S1.1(b);

6) applying additional enhancements under relevant general adjustment provisions laid out in Chapter Three of the Guidelines Manual.

Thus, the district court started with a base offense level of 10, specified by § 2C1.1(a) as the base offense level for extortion. It applied a two-level enhancement under § 2C1.1(b)(1) because the offense involved more than one incident of extortion, and an eight-level enhancement under § 2C1.1(b)(2)(B) because the extortion involved a payment for the purpose of influencing an elected decision-making official. The final offense level under § 2C1.1 was thus 20. Under § 2S1.1(a), level 20 became the base offense level for the money laundering, to which the court applied an additional two-level enhancement under § 2S1.1(b)(2)(B) because the offense involved a conviction under the money laundering statute, 18 U.S.C. § 1956.

The court then turned to the general-purpose adjustment provisions of Chapter Three, and found

two applicable. The court applied a two-level enhancement for abuse of a position of public trust under § 3B1.3,[5] and another two-level enhancement for obstruction of justice under § 3C1.1.[6] Cruzado's final offense level under these calculations was 26, and the court determined that he fell into criminal history category I. Taken together, the offense level and criminal history category produced a recommended sentence of 63–78 months. *See* USSG Ch.5, Pt.A (Sentencing Table). This recommended sentence was no shorter and potentially longer than the 63 months to which Cruzado had originally been sentenced. The court decided that Cruzado ought not to suffer for having exercised his right of appeal, and imposed a sentence identical to the one earlier imposed. Cruzado timely brought this appeal,

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[5] In 2002, § 3B1.3 read in relevant part: "If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic." § 3B1.3.

[6] In 2002, § 3C1.1 read: "If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (I) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels." § 3C1.1.

challenging the district court's application of several provisions of the Guidelines.[7]

II. Legal Challenges

On a challenge to a sentence imposed on the basis of a Guidelines recommendation, we "determine the legal meaning of Guidelines provisions de novo." *United States v. Robinson*, 433 F.3d 31, 35 (1st Cir. 2005).

A. Extortion by an Elected Official

The district court increased Cruzado's offense level by eight points under § 2C1.1(b)(2)(B), which states: "If the offense involved a payment for the purpose of influencing an elected official or any official holding a high-level decision-making or sensitive position, increase by 8 levels." Cruzado was convicted for being on the receiving end of various corrupt pay-offs, and he argues that this provision only applies when a defendant has *made*, rather than received, the payment. Nothing in the quoted language suggests that this is so. The provision reflects the Sentencing Commission's determination that the abuse of a position of great public trust, or the effort

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[7] Cruzado also challenges the court's order requiring payment of restitution and a fine, and ordering supervised release, but in too perfunctory a manner to permit us to evaluate the merits of those aspects of his punishment. "[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.1990).

to corrupt a person holding such a position, is more dangerous than the corruption of, for example, a housing inspector or tax assessor. The eight-level increase is mandated for a defendant precisely like the defendant here, an elected official who abuses his position. Extortion "involves" payments intended to influence the behavior of the extortioner just as clearly as bribery "involves" payments intended to influence the bribe-taker.[8] See *United States v. Bynum*, 327 F.3d 986, 993–94 (9th Cir. 2003); *United States v. Villafranca*, 260 F.3d 374, 381–82 (5th Cir. 2001). The district court correctly applied an eight-level enhancement under § 2C1.1(b)(2)(B).

B. Incorporation of a Referenced Guideline

Section 2S1.1 of the Sentencing Guidelines, which applies to money laundering, directs the sentencing court to take as the base offense level for purposes of § 2S1.1 the full calculated offense level that applies to the offense which produced the laundered funds. See§ 2S1.1(a) ("Base Offense Level" for money laundering is "[t]he offense level for the underlying offense from which the laundered funds were derived"). Here, this instruction meant that, before considering what money-laundering-related adjustments to apply to Cruzado's sentence, the court first had to calculate the sentence as it would have applied to the extortion counts standing alone, making reference to § 2C1.1. It was only then

[8] Nor is the rule of lenity applicable, as Cruzado claims: there is nothing at all ambiguous in § 2C1.1.

required to return to § 2S1.1 (and specifically to § 2S1.1(b)) to determine if further adjustments were necessary under that provision. In this case, having calculated the final offense level for the extortion offenses under § 2C1.1 and applied it as the base offense level for money laundering under § 2S1.1, the district court went on to find that a further two-level enhancement was warranted under § 2S1.1(b)(2)(B), because Cruzado was convicted of money laundering under 18 U.S.C. § 1956.

Cruzado contends that, having once turned from § 2S1.1 to § 2C1.1 under the direction of § 2S1.1(a), the district court should not have turned back to a consideration of the special offense characteristics under § 2S1.1(b), but this is flatly incorrect. As is generally the case among the offense guidelines specified in Chapter Two of the Guidelines Manual, § 2S1.1 contemplates that the adjustments for special offense characteristics specified in its part (b) will be applied after the base offense level specified in its part (a) has been calculated, whether or not that base offense level is calculated by reference to another provision of the Guidelines.[9] The district

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[9] Section 1B1.5 provides instructions for reading a guideline that refers to another guideline. That section directs that "[a]n instruction to use the offense level from another offense guideline refers to the offense level from the entire offense guideline." § 1B1.5(b)(1). This provision meant here that, where § 2S1.1(a) incorporated the offense level for extortion as the base offense level for money laundering, it incorporated the final calculated offense level for the extortion, which was 20, and not merely the unadjusted base offense level for extortion,

court rightly applied the special offense characteristic provisions of § 2S1.1(b) after finishing its § 2C1.1 calculations.

C. Abuse of Trust

The district court applied a two-level abuse-of-trust enhancement under § 3B1.3. That section calls for such an increase "[i]f the defendant abused a position of public or private trust ... in a manner that significantly facilitated the commission or concealment of the offense." § 3B1.3. It cautions, however, that "[t]his adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic." *Id.* This second provision bars application of a § 3B1.3 abuse-of-trust enhancement to a case in which any provision that increases a sentence for an offender who holds high public office already applies. This is such a case.

The district court here evidently found the § 3B1.3 abuse-of-trust provision applicable because Cruzado had used the power of his high office in extorting and embezzling funds.[10] Abuse of high office was the

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which would have been 10. Cruzado argues that the instruction under § 1B1.5 that § 2S1.1(a) be read to incorporate the "entire offense guideline" specified at § 2C1.1 precluded making further adjustments under the remainder of § 2S1.1, but this reading of § 1B1.5 is simply implausible.

[10] While the court did not explain in detail its reasons for imposing the § 3B1.1 abuse-of-trust enhancement, it is evident that it did so because it considered Cruzado's use of his high

same concern, however, that justified the application of an eight-level enhancement under § 2C1.1(b)(2)(B).Section 3B1.3 and § 2C1.1(b)(2)(B) both increase a defendant's sentence for abusing a position of trust, and by the terms of § 3B1.3 cannot both be applied to increase the same defendant's sentence.[11]

In arguing in favor of the § 3B1.3 enhancement, the Government relies primarily on an application note to the laundering guideline, which says that in cases where the offense level is determined by reference to the guideline for another offense, "application of any Chapter Three adjustment shall be determined based on the offense covered by this guideline (*i.e.*, the laundering of criminally derived funds) and not on the underlying offense from which the laundered funds were derived." § 2S1.1 cmt. n. 2(C). At first blush, one might read this to suggest that in this case the calculation under the extortion guideline,

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office to facilitate his wrongdoing to trigger the guideline provision, and this is indeed a typical understanding of the provision. See, e.g., *United States v. Sarault*, 975 F.2d 17 (1st Cir.1992) (noting that former mayor had been determined to have merited, and had not challenged, § 3B1.3 abuse-of-trust enhancement for role in corruption scheme).

[11] The Sentencing Commission itself appears to recognize that § 2C1.1(b)(2)(B) and § 3B1.3 are redundant, for in the application notes to § 2C1.1, the Commission directs that when sentencing under the provisions of § 2C1.1, a sentencing court should "not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill)." § 2C1.1 cmt. n. 3. We do not rely on the application note in reaching our decision, however, but on the plain language of § 3B1.3.

including its abuse-of-trust enhancement, should simply be ignored when it comes to considering the § 3B1.3 adjustment, and instead one should simply ask the mechanical question whether in his money laundering activities a defendant abused a position of trust. In answer to that question, the district court apparently found that Cruzado's official position facilitated not only his extortion but also his money laundering. Cruzado attacks the latter conclusion, but it seems plausible enough to us.

The weakness of the Government's larger argument, however, is that the § 3B1.3 abuse-of-trust enhancement, as we have noted, "may not be employed if an abuse of trust ... is included in the base offense level or specific offense characteristic." § 3B1.3. While application note 2(C) to the money-laundering guideline provides that Chapter Three adjustments should be determined with reference to the money-laundering *offense* and not to the underlying offense, the fact remains that the money-laundering offense level was itself determined pursuant to a cross-reference that already required an upward adjustment based on abuse of trust-thereby literally triggering the prohibition ("This adjustment may not be employed ...") which we have just quoted.

Although double-counting is not automatically impermissible under the Guidelines (and is sometimes intentionally directed), we can see no particular reason why one would want double-counting in this situation. For these reasons, we

conclude that the district court erred in applying an abuse-of-trust enhancement under § 3B3.3.

III. Conclusion

Having determined that the court's interpretation of the Guidelines was legally erroneous, see *Robinson*, 433 F.3d at 35, we must again send the case back to the district court. *See United States v. Plaza-Garcia*, 914 F.2d 345, 347 (1st Cir. 1990); 18 U.S.C. § 3742(f)(1) (requiring that incorrectly calculated sentences be remanded). In remanding the case, we do not intend to intimate that the length of the sentence should necessarily be changed; what matters is that the premise as to the Guideline range must be correct.

The sentence imposed by the district court is ***vacated*** and the case is ***remanded*** for resentencing.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA, Plaintiff, vs. JUAN MANUEL CRUZADO LAUREANO, Defendant.	C.R. 01-690 San Juan, Puerto Rico 26 April 2006 10:30 a.m.

RESENTENCING HEARING

BEFORE THE HONORABLE JOSE A. FUSTE
UNITED STATES DISTRICT COURT CHIEF JUDGE

APPEARANCES

COUNSEL FOR PLAINTIFFS
GUILLERMO GIL, AUSA

COUNSEL FOR DEFENDANT
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THE COURT: Let's call the case.

THE CLERK: Yes, Your Honor. For resentencing hearing, Criminal 01-690. United States of America vs. Juan Manuel Cruzado Laureano.

Appearing for the government, Assistant U.S. Attorney, Guillermo Gil Bonar.

And appearing for the defendant, attorney Alexander Zeno.

MR. ZENO: Alexander Zeno for Juan Manuel Cruzado Laureano, and we are ready to proceed?

THE COURT: Let me first discuss a couple of preliminary matters with you. I have read the sentencing memorandum which each side filed. And everybody seems to be in agreement that the law of the case is the Court of Appeals' opinion of March 14, 2006 where an abuse of trust enhancement under Guideline Section 3(B)(1.3) was stricken because it constituted a double counting in the sense that the other guidelines that were used to determine base offense level and adjustments already included that kind of conduct.

So basically that's where we stand, correct, Mr. Zeno?

MR. ZENO: Yes, Your Honor, that is where we stand.

THE COURT: Do you agree with that?

MR. GIL: Yes, Your Honor.

THE COURT: So basically, if we were to look at the original guideline calculation, the one that appears in the judgment commitment order of May 31st, 2005, which is the one that the Court of Appeals reversed, the only initial apparent thing to do would be to start reducing the base offense level

to 24, correct?

MR. ZENO: I don't have the guidelines, but if that is the first 51 to 63.

THE COURT: It is 24. Criminal history category still would be 1, And, as you well pointed out, Mr. Zeno, the imprisonment range would be 51 to 63 months, correct?

MR. GIL: That is correct, Your Honor.

THE COURT: And the supervised release would be still two to three years. There is a change in the fine range by virtue of the statute. The fine range would go from 10,000 to 500,000, correct?

MR. ZENO: That's correct, Your Honor.

THE COURT: So everybody is in agreement as to that part.

Another significant difference in this sentencing hearing would be the following: Booker has been decided and I do think that no matter how you look at it the proper thing to do would be to think in terms of the recommended analysis by the case law, which is, first, you make a guideline calculation, which we have agreed is a 24 and criminal history category of 1.

And then we look at the possibility or look to see whether a nonguideline sentence should be considered under Booker and also that brings into play the 3553(A) factors, sentencing factors that appear in the statute that have application in two ways.

First, the first application would be if we were to impose a nonguideline sentence then we would have to deal with these sentences. And then even if you were to impose a guideline sentence you could still look at 3553(A) to see where in the guideline the

defendant should be sentenced. Does everyone agree that is a correct legal analysis?

MR. ZENO: I don't agree with the fact that Booker is binding on this Court today.

THE COURT: You are telling me that I should do -- you are telling me that no matter how you look at it I should do a guideline sentence.

MR. ZENO: That is correct, Your Honor. I guess Booker would apply, that the Court can look at 3553 as to whether it would sentence on 51 or 53 just to determine that range.

THE COURT: This is all moot in a sense because I have no intention of making a nonguideline sentence. I just want to make the analysis to make certain that we are talking about the same thing. But it seems to me that we are in agreement that here we are going to use then an advisory guideline sentence. There is no reason to look elsewhere. We are going to remain within the confines of an adjusted base offense level of 24 with an imprisonment range of 51 to 63 months imprisonment, supervised release two to three years, fine range 10,000 to 500,000, correct?

MR. ZENO: If the Court is going to use the guidelines then --

THE COURT: That is what you want me to do, correct? You want me to use the guidelines. You want me to use --

MR. 2ENO: The Court is going to sentence as it stated as to the guidelines. Then my argument is moot as to whether Booker is binding.

MR. GIL: We are in agreement, Your Honor.

THE COURT: The next issue is this, so there is no disagreement. Everybody is in agreement

about what is the impact of the appellate opinion of March 14, and how it effects, at least initially, the potential guideline calculation that must be made for this case.

So the other thing that we have to discuss is this., I saw in the motions that were filed that the defendant wished to present evidence at this hearing.

MR. ZENO: Yes, Your Honor, that's correct.

THE COURT: And one of the items of evidence is calling an F.B.I. witness to testify.

MR. ZENO: That's correct, Your Honor.

THE COURT: But I understand that witness was not properly subpoenaed under the applicable regulations that apply to these cases. Everybody concedes that is so.

MR. ZENO: Well, we did submit the subpoena on time and we did submit a letter. As to our conversation with the counsel for the F.B.I., he advised us and he was aware of what was our intention as to this matter.

THE COURT: But the question is -- I need to have a clear answer. Do you think you complied with the two regulations that required that certain things be done in order to have an F.B.I. agent testify at a sentencing hearing?

MR. ZENO: First of all, I feel that we would like to submit, just for the record, I know that such regulations are not valid. They are unconstitutional.

THE COURT: So what you are saying is I should consider them as unconstitutional regulations although you concede that, technically speaking, you did not comply with the regulations.

MR. ZENO: My second point would be that I

did comply with it.

THE COURT: That is required by the regulations?

MR. ZENO: That we submit a subpoena and that we inform the agent that is going to testify and outline what type of inquiry we will make—what type of questions we will make and we did file a letter and we did submit a subpoena. I don' t think there is—Everything within those regulations are contained in whatever we did.

THE COURT: Why is it that the government is claiming that he did not comply with the regulations?

MR. GIL: Because he did so two days ago and the agent was not here, and we haven't sufficient time to evaluate his request.

THE COURT: But other than that he complied with the regulation?

MR. GIL: He did comply because at first he submitted the subpoena without the letter. The regulations required that you have to serve a subpoena with the letter to the supervisor of this agent explaining what is the purpose of this testimony. He served the subpoena. He did not comply with the letter. Then he spoke to the legal counsel at the F.B.I. and they explained to him he had to submit a letter. He submitted the letter two days ago.

THE COURT: So the issue is that he supplemented his original request by sending the letter, but he sent it late.

MR. GIL: That's right. The agent is in Spain. She was in Spain.

THE COURT: But if he had done this, let's

say, 20 days ago it would be a valid subpoena?

MR. GIL: A valid subpoena as to complying with the regulations.

THE COURT: Okay.

Fine. I understand.

What is it that you want from her? What kind of testimony you want from her?

MR. ZENO: Before I answer your question I would like to submit for the record that we did talk to the chief counsel for the F.B.I. over there; and we did inform; and we do feel that we did comply.

THE COURT: That is fine.

MR.. ZENO: As to the fact we didn't inform the F.B.I. of our intentions of what we were planning to inquire, and as to what we were going to ask her about, we are going to ask her about how this whole case started. That's important because that goes to show that my client, as part of his allocution, is claiming innocence, and he is entitled to bring witnesses to show that he is actually innocent.

THE COURT: So basically—Let me see if I understand this. This testimony of this agent is required to prove innocence at a sentencing stage?

MR. ZENO: Not innocence. It is to prove that there was malicious prosecution in this case and that goes to show that my client—It goes to show that this Court should take that into consideration when it decides to sentence my client to 51 months or anywhere within the range.

THE COURT: So basically this testimony would be to establish a factual basis, if you will, an illegal basis for a claim of prosecutorial misconduct.

MR. ZENO: We feel the Court should take that into consideration when it decides to sentence

my client.

THE COURT: Okay. The other evidence that you intend to present is along the same lines,.

MR. ZENO: Not all of it, Your Honor.

THE COURT: How many witnesses you intend to present?

MR. ZENO: We were able to reach, I think, nine of them.

THE COURT: But tell me who they are and for what purpose. The F.B.I. agent is for prosecutorial misconduct.

MR. ZENO: Dr. Gonzalez is going to show that he was not the victim of extortion.

THE COURT: Let me just make a note.

MR. ZENO: Second, that he never felt threatened by Mr. Cruzado. He is also going to testify that as to the character of my client and as to what he feels this Court should do at sentencing.

THE COURT: Just give me a minute.

And who is the other witness?

MR. ZENO: The other witness would be Mr. Angel Castillo. He is the head of the office of the Commission of Municipal Affairs.

THE COURT: What would he say?

MR. ZENO: He would testify that no money was due to the municipality of Vega Alta by my client.

THE COURT: Was due by whom?

MR. ZENO: By my client to the Municipality of Vega Alta. That goes to the restitution. Your Honor.

THE COURT: Okay.

What else?

MR. ZENO: The same would be for Mr.

Orlando Ramirez who used to be the president of the legislative assembly of Vega Alta.

THE COURT: Who else?

MR. ZENO: The fourth one would be Mr. Jose Colon Garcia who used to be the secretary of the city of Vega Alta and he also used to be the mayor over there, and he will testify as to other matters.

THE COURT: Give me a minute.

MR. ZENO: Then Ms. Lillian Alonso, she will testify as to restitution and whether she feels she was ever extorted by my client and as to the character of my client.

THE COURT: And the sixth one would be.

MR. ZENO: Mr. Benjamin Declet. He was the director of finance at the municipality of Vega Alta and he is going to testify to the fact that nowhere in the records of municipality is there showing that my client owes any money to the municipality of Vega Alta.

THE COURT: And who would be the 7th witness?

MR. ZENO: The 7th one would be Mrs. Marilyn Garcia. She will also testify as to the fact that my client does not owe any money to the municipality of Vega Alta. And she is also going to be a character witness. All those are related to restitution.

THE COURT: Who else?

MR. ZENO: Mr. Ernesto Ortega. He will testify as to restitution.

THE COURT: In what sense?

MR. ZENO: In the sense that whatever claim of restitution Mr. Benjamin Declet made he made it because this person asked him to do it, not because

Mr. Benjamin Declet actually felt he had to do it.

THE COURT: That Ortega asked him to do it?

MR. ZENO: Correct. It is related to the request that Mr. Benjamin Declet made as to any claim for restitution for the municipality of Vega Alta. And Mr. Manuel Saldana, and he will testify as to an auditing report that his office prepared for the year 2001. And that is related to restitution.

THE COURT: In what sense?

MR. ZENO: In the sense that it does not show there was any embezzlement in the municipality and it doesn't show that any money was owed to the municipality.

THE COURT: I see. Who else?

MR. ZENO: No one else, Your Honor.

THE COURT: Let me ask now, Mr. Gil, why should we allow or disallow this testimony.

MR. GIL: Well, Your Honor, my first question is what's new here? All this—As a matter of fact, I think the majority of persons he has mentioned testified in this Court. They were cross-examined by defense counsel. They have been, all of them, available on the two previous sentencing hearings. I think even the issue of—Because he told us he has 10 witnesses including the F.B.I. agent, the testimony of the F.B.I. agent as to how this case started, I think, and please, the Court, bear with me because I don't have my facts clear, and a lot of time has gone by but, if I remember correctly, during the trial of this case it was clear that it was a person that called the F.B.I. The F.B.I. interviewed this person as to the activities of Mr. Cruzado and then they presented the matter to our office.

THE COURT: But let me ask you, isn't all this, in a sense, foreclosed. There is an affirmance of the conviction.

MR. GIL: That is what I am saying, Your Honor. There is nothing new here. This sentencing hearing is for one specific purpose. There is a mandate by the Court of Appeals as to the two points that were improperly, according to the Court of appeals, ism properly adjudicated to this defendant. An the Court has now remanded the case for resentencing. Take the two points off. $e have all agreed this is what we are here for so now we are on a 51 to 63 guideline range. The Court has already said it is going to follow the guidelines. So there is no—This is over with. All this is matters—Benjamin Declet, other things about if the defendant embezzled money or not, those were things that the jury found beyond a reasonable doubt.

THE COURT: The law of the case is that the conviction stands as to all the counts.

MR. GIL: And there is no issue as to restitution here. The issue of restitution, he wants to bring four or five witnesses here as to the matter of restitution. There is no issue.

THE COURT: Why should I listen to this, counsel? Don't you think that this is all foreclosed by the disposition that the Court has made, the district court and the Court of Appeals.

MR. ZENO: Not at all, Your Honor.

THE COURT: Why?

MR. ZENO: The Court of Appeals vacated the sentence without any instructions. $hen the Court of Appeals vacates a sentence without any instructions the Court has to consider the whole

sentence. It includes the guideline calculation restitution. And all those three elements go together. So the sentence was vacated in full.

THE COURT: But wasn't the restitution issue argued before the Court of Appeals?

MR. ZENO: They didn't address the matter they claimed --

THE COURT: That was not the question was it part of the brief on appeal? Did you challenge the restitution?

MR. ZENO: Correct, we did.

THE COURT: And the Court of Appeals did not enter that at all.

MR. ZENO: The sentence, in full, they didn't make any findings at sentencing. It doesn't mean the sentencing should not be considered in resentencing. It did not give this Court any instruction as how It should impose the sentence. The Court should consider all the elements of sentencing.

THE COURT: Very well.

MR. GIL: May I address that matter just briefly. I know the Court is familiar with this; and I will put it on the record. The conclusion of the Court of Appeals opinion says had it determined that the Court's interpretation of the guidelines were legally erroneous. We must again send the case back to the district court. In remanding the case we do not intend to intimate that the length of the sentence should necessarily be changed. What matters is that the premise as to the guideline range must be corrected.

THE COURT: I understand perfectly what the Court of appeals said.

Frankly, I am going to tell you what I think. I don't think the issue of prosecutorial misconduct is open at this stage of the proceedings and I don't think the issue of restitution is open at this stage of the proceedings. Therefore, I will not allow any of these witnesses to testify as to that. It is as simple as that.

That is not an issue. The only issue before the Court is where within the range of 51 to 63 I should proceed to sentence this defendant. Nothing else.

MR. ZENO: I fully disagree.

THE COURT: You may disagree. This is what we are going to do. So the questions for you now is to argue where in the guideline range I should sentence the defendant.

MR. ZENO: Well, Your Honor, are you going to allow any of the witnesses even though they are going testify as to character?

THE COURT: Which ones are going to testify as to character?

MR. ZENO: Well, Dr. Gonzalez.

THE COURT: Dr. Gonzalez.

MR. ZENO: Who is here.

THE COURT: As to character. Who else?

MR. ZENO: Mrs. Lillian Alonso, Mr. Benjamin Declet.

THE COURT: As to character.

MR. ZENO: Ms. Marilyn Garcia, did I mention that one?

THE COURT: You did.

MR. ZENO: I think those are the ones we can question today.

THE COURT: What issue of character are you going to raise?

MR. ZENO: I'm sorry, Your Honor.

THE COURT: What issue of character are we going to be talking about?

MR. ZENO: All issues of character, Your Honor. Whether they feel this person, the sentence imposed by this Court before and whether this Court should impose any sentence above 51.

THE COURT: I will not allow that under any circumstances.

MR. ZENO: That is their opinion, Your Honor.

THE COURT: I will not allow any witness to tell me what to do.

MR. ZENO: They are going to tell you their opinion.

THE COURT: If you are going to present some evidence of character strictly as to that about him that I should consider I will consider allowing you to do that; but it is strictly character and nothing else.

MR. ZENO: That is character, Your Honor.

THE COURT: It all depends on what you ask.

MR. ZENO: That is why they are here to influence this Court.

THE COURT: It all depends on what you ask. Why don't you try calling one to see what happens.

MR. GIL: May I address the Court. These witnesses that he is mentioning now they all testified here. They all testified and they were cross-examined. They were cross-examined as to whether they had fear, all those things. They all said that they trusted Mr. Cruzado. That's why they did what they did, because they trusted he was doing the right thing, that he was the mayor of the municipality of

Vega Alta.

THE COURT: Mr. Gil, listen to me. This case is not going to come back for resentencing ever again. Do you see what I mean?

MR. GIL: I hope so.

THE COURT: I am going to allow him to call one to see where he is heading on the issue of character. If it goes beyond what I think is permissible I will not allow it. It is as simple as that.

Which one do you want to call first?

MR. SENO: Can you give us a short break,

THE COURT: We have to proceed.

MR. ZENO: Your Honor said you are going consider whether our questions are valid or not.

THE COURT: You are able enough to be able to ask the questions you have to ask.

MR. ZENO: No problem, Your Honor. Then we want to call Dr. Gonzalez to the witness stand. I know the controller of Puerto Rico is here.

THE COURT: Only those that pertain to character that you think are character witnesses I will allow.

MR. GIL: There are people from the municipality that are here that were employees from municipality that were here last time.

THE COURT: If they want to stay they can stay. They are more than welcome.

MR. ZENO: As far as I know, I called them as witnesses.

THE COURT: I don't want any argument between the two of you.

Call your witness please.

MR. ZENO: I did call it. Dr. Gonzalez.

THE COURT: Where is he?

LUIS GONZALEZ BERMUDEZ,

was called as a witness, and after having been duly sworn, was examined and, through the interpreter testified as follows:

DIRECT EXAMINATION

BY MR. ZENO:

Q Good morning Dr. Gonzalez?

A Good morning.

Q For the record can you please state your full name?

A Luis Gonzalez Bermudez.

Q And can you tell us where are you employed or what type of business do you have?

A I represent the Vega Alta Medical Hospital Corporation.

Q As far as you know, is this corporation that you represent—That you own, it is or was it in any way related to Mr. Juan Manuel Cruzado Laureano in any way?

A No.

Q Not even in the past?

A In the past we were administrating a Vega Alta Hospital, the CDT.

Q In what relation was he related to this CDT? THE COURT: We all know this. Go to the issue of character please.

BY MR. ZENO:

Q Your Honor, we need to know how he knows Mr. Cruzado?

THE COURT: I know how he knows Mr. Cruzado. The record is here. We have a transcript of this whole trial. Please I don't need that information.

MR. ZENO: This is not a trial. This is sentencing and the evidence that is presented at sentencing is different from the evidences that presented at trial.

THE COURT: I know exactly who the doctor is. I know exactly what role he played in all this. You want to ask him about character ask him about character.

MR. ZENO: Okay Your Honor. I will proceed.

BY MR. ZENO:

Q Sir, have you ever felt that Mr. Cruz ado did anything wrong against you?

A Not against me, no.

Q So you never have filed a complaint against Mr. Cruzado?

A No.

Q Nor have you asked anyone to do so on your behalf?

A I was a witness in the case.

Q But you never asked anyone to actually file a complaint on your behalf?

A No.

Q You are aware that this Court found that Mr. Cruzado extorted 5,000 from you or your corporation. Are you aware of that?

A Yes.

Q And as to that you never filed a complaint?

A No.

MR. GIL: Your Honor, I am going to object to this line of questioning.

THE COURT: This line of questioning—This is not character. I have not said a word, but it is not character at all.

MR. ZENO: It is character.

THE COURT: No. This was not character.

MR. ZENO: This person was considered by the Court a victim of Mr. Cruzado so it is important for the Court to consider whether he actually feels whether he is a victim.

THE COURT: Character is well defined in the case law. It is well defined under the Rules of Evidence. Strictly that I or will have to ask you to discontinue his testimony.

MR. GIL: And all of this was brought up during cross-examination of this witness during trial.

MR. ZENO: This is not a trial. This is all to determine whether my client should get 51 or 63.

THE COURT: You heard what I said.

MR. ZENO: I am trying to answer.

THE COURT: He is not here to help you, believe me.

MR. ZENO: I know that for sure.

THE COURT: Believe me.

MR. ZENO: Okay.

BY MR. ZENO:

Q Doctor Gonzalez, of your own belief do you feel it is fair or reasonable that Mr. Cruzado be continued or force to use a convict uniform and stay in a maximum security jail?

MR. GIL: Objection, Your Honor.

THE COURT: Sustained. Totally improper question, counsel.

MR. ZENO: That is as to his character, Your Honor.

THE COURT: Sustained. Next.

BY MR. ZENO:

Q Doctor Gonzalez, what is your personal belief or how do you feel about the personality about the person of Mr. Cruzado?

MR. GIL: Objection. That is not character.

THE COURT: I will allow it.

THE WITNESS: I may answer?

THE COURT: Sure.

THE WITNESS: Can you repeat.

BY MR. ZENO:

Q What do you feel are your personal feelings as to Mr. Cruzado? What type of person do you feel that he is?

A At that time I had relations with Mr. Manny Cruzado. He was the mayor of the town at that time. And all of the relations I had I felt he was handling his area. I was in charge of the CDT. And I never had any problems in terms of the municipality or anything.

Q Do you feel he is a good citizen?

A Yes.

Q Do you have any knowledge of any type of good deeds or things that he did for the community --

A No.

Q -- that you have personal knowledge of that he did?

A Well, his performance at the time, he was very devoted to the municipality.

Q So, in general, would you say that he is a good person?

A Yes.

MR. ZENO: We have nothing else for this witness.

THE COURT: Thank you very much.

MR. GIL: No questions.

THE COURT: Thank you very much. You are now excused, Doctor.

Next please.

MR. ZENO: Our next witness is Mrs. Lilly Alonso. She is here.

LILLIAN ALONSO ALVAREZ,

was called as a witness, and after having been duly sworn, was examined and,- testified as follows:

DIRECT EXAMINATION

BY MR. ZENO:

Q Good morning, Mrs. Alonso?

A Good morning.

Q Can you give us your full name for the record?

A Lillian Alonso Alvarez.

Q Where do you work or what type of business do you have?

A A travel agency.

Q What is the name of that travel agency?

A Sidney Travel.

Q Did you have that travel agency during the year 2001?

A Yes.

Q And did you have it while my client was being accused before this Court?

THE COURT: Counsel, once again, she testified at trial, she gave us all the details.

MR. ZENO: I am just giving her instruction, Your Honor,

THE COURT: There is no need to do that. Ask her about character.

MR. ZENO: Just give me a second just to choose my questions for you.

BY MR. ZENO:

Q Ma'am, have you ever felt intimidated by Mr. Cruzado?

A No.

Q And what was the extent of your dealings with Mr. Cruzado?

MR. GIL: Objection.

THE COURT: Sustained.

MR. ZENO: Your Honor.

THE COURT: I have heard her testimony at trial. I have read this whole record for the purposes of this hearing. I don't see the reason to go through this. Ask her about his character, if she knows, and that would be it.

BY MR. ZENO:

Q Ma'am, as to the fact that Mr. Cruzado is here, what do you think about the fairness of that, that he be incarcerated?

THE COURT: That is an improper question, counsel. I am sorry. I will not allow that.

MR. ZENO: So I will withdraw the question.

BY MR. ZENO:

Q Ma'am, in general, what do you think about Mr. Cruzado, can you tell the Court about his personality, about his fairness?

A The only thing I could tell is that year I trust him like a mayor. I do everything concerning the trip, but that is the only thing.

I don't have anything concerning him that I have to give some explanation or anything at all.

Q So do you have any type of —Did you ever have any meetings with him?

A What do you mean like meetings?

THE COURT: Counsel, remember we

received the full testimony of this woman at trial. And she gave us all the details of her involvement with the municipality and the mayor in reference to that trip. So, therefore, those details are really not relevant at this time.

MR. ZENO: I am just trying to clarify the question I made to her. She is answering her dealings with Mr. Cruzado were mostly, and I do believe so, business dealings. And 1 am trying to find out whether she got to know Mr. Cruzado on a personal basis.

THE COURT: That was not the question. The question was asking about specific meetings. Ask her about that. Did you ever get to know him personally. You can ask her that.

BY MR. ZENO:

Q Did you ever get to know him personally?

A No.

Q Not at all?

A Not at all.

Q You only talked to him about business?

A Business, yes.

Q So you never had a chance to ascertain his character?

A No. Only business.

MR. ZENO: Nothing further.

THE COURT: Okay. You are now excused. Next witness.

MR. ZENO: Your Honor, we want to call Mr. Benjamin Declet. Just one second so he won't lose any time.

THE COURT: We can call Mr. Declet and swear him in.

Mr. Declet. was called as a witness, and after having been duly sworn, was examined and, through the interpreter testified as follows:

DIRECT EXAMINATION

BY MR. ZENO:

Q Sir, first of all, what is your name, your full name?

A Benjamin Declet Salgado.

Q And what was your position in the municipality of Vega Alta in 2001 when Mr. Cruzado was the mayor?

A I held a position of finance director in the municipality of Vega Alta.

Q Sir, do you know Mr. Cruzado in a personal basis?

A Yes, sir.

Q Sir, could you tell the Court if you feel that Mr. Cruzado is a criminal in your own personal belief. I am not talking about the law because you are not a lawyer?

MR. GIL: Objection.

THE COURT: Sustained. That is not a proper question.

MR. ZENO: I am not asking him to define.

THE COURT: I have given you a ruling. You have to live with it.

BY MR. ZENO:

Q Can you tell the Court what you feel about Mr. Cruzado personally?

A I have known Mr. Cruzado since we were born and grew up together in Vega Alta. I have known him : throughout the years before arriving at the municipality of Vega Alta to hold the position of finance director. And as far as what I can say about

him, we always had a good friendship and I never had any kind of trouble with him. And I believe that before he was working with the municipality of Vega Alta he never had any kind of trouble there that I know about.

And, to the best of my knowledge, based on what was revealed during the investigation and the trial and I believe that Mr. Cruzado before coming to the municipality of Vega Alta was always a businessman. And my opinion about him personally is that he didn't know how to maintain the line between activities he was carrying out before as a businessman and the activities that were within his purview as the chief executive of the municipality.

And if he made any mistakes or infractions, perhaps it was lack of orientation.

MR. ZENO: We have nothing further with this witness?

THE COURT: Anything, Mr. Gil?

MR. GIL: Nothing, Your Honor.

THE COURT: Thank you very much. You are excused.

Anybody else.

MR. ZENO: Your Honor, excuse me for a second.

We can call Mrs. Marilyn Garcia.

THE COURT: Marilyn Garcia.

MR. ZENO: Let me have just one second to review my line of questioning.

MARILYN GARCIA,

was called as a witness, and after having been duly sworn, was examined and, through the interpreter testified as follows:

DIRECT EXAMINATION

BY MR. ZENO:

Q Good morning, Mrs. Garcia?

A Good morning.

Q For the record can you give us your full name?

A Marilyn Noemi Garcia Hernandez.

Q Mrs. Garcia, what do you do for a living now?

A I'm librarian in the Department of Education.

Q What was your position in the municipality of Vega Alta when Mr. Cruzado was the mayor over there?

A I was working with the Department of Education. I did' t work for the municipality.

Q But you did know Mr. Cruzado then, right?

A Yes, sir.

Q How?

A As the mayor.

Q You didn't know him on a personal level?

A I knew his children. His children, they were in school, the wife.

Q But you didn't have any type of personal relationship with him?

A No.

Q Okay.

MR. ZENO: Just one second. We have no further questions for this witness. She can be excused.

THE COURT: Thank you very much. You are excused.

Anything else.

MR. ZENO: Those are the only witnesses you allowed and we would like to address you through allocution.

THE COURT: I will hear you through counsel's allocution now.

MR. ZENO: Before I go into my counsel allocution, Your Honor, I would like to submit all these questions that I had had for the witnesses that you would not allow.

THE COURT: You want to submit your proposed direct examination of all these witnesses?

MR. ZENO: That's correct, Your Honor.

THE COURT: I will allow to you do that.

MR. ZENO: For the record, this is Dr. Gonzalez. For the record, I am submitting the following interrogatories. First, Dr. Gonzalez, Lili Alonso, Benjamin Declet, Marilyn Garcia, Licenciado Angel Castillo, Orlando Ramirez, Jose Colon Garcia and Ernesto Ortega and Manuel Diaz Salgado.

THE COURT: Mark them as a group. Defendant's Exhibit 1 for the sentencing hearing.

MR. ZENO: Well, Your Honor, first of all, and for the record, we would like to submit that we object that this Court is sentencing Mr. Cruzado today. We did file a motion for disqualification which this Court denied.

Secondly, we feel and this matter is still open in the Court of Appeals, that this case should have been remanded to a different judge. Okay.

And for expo facto reasons this sentence cannot be above 63 months. So the Court should sentence the defendant anywhere between 51 and 63 months.

THE COURT: And we greed that.

MR, ZENO: That is fine, Your Honor. I didn't know we were going to agree with that. I prepared this before. I would like to incorporate all previous filings which includes our motions on restitution all sentencing memorandums and any documents we have filed throughout these whole proceedings.

As to the fine, Mr. Cruzado is clearly a person who has no means to pay a fine so this Court should take into consideration and impose no fine on Mr. Cruzado.

THE COURT: We didn't impose a fine before, did we.

MR. ZENO: You did. $10,000.00.

THE COURT: We did?

MR. ZENO: And I submit at that time he also did not have the means. As to restitution, this Court doesn't want us to address anything on restitution, so we will not address the matter because we did not have the chance to make questions to the witnesses. But our position has always been that no restitution should have been imposed.

Okay. And as to the term of incarceration we feel that this Court is considering the fact that my client has never, not even today, accepted responsibility for his acts. We would like to remind the Court that the guidelines provide for such circumstances. When a person does not accept responsibility he doesn't get any credits. And he is not getting any credits for that. What we mean by that is that this Court should not penalize my client for not taking responsibility.

THE COURT: He has a right not to accept responsibility if he does not.

MR. ZENO: He should not be penalized for

that.

THE COURT: That is something that should be considered within the concept of what the law is.

MR. ZENO: This law is considering that because of his personality and he has always objected to many of the findings of this Court and we feel that should not be the case.

THE COURT: Very well.

MR. ZENO: As this Court knows, even when defendants go to trial this Court sentences first offenders to the lower end of the range and that has happened many times in this Court. And my client went to trial and he did not accept responsibility. There is no reason he should not be sentenced at the lower end of the range. Our sentencing memorandum fully argues why Mr. Cruzado should get the lower end as per Section 3553.

We—Dr. Gonzalez testified here that he did not feel he was a victim of Mr. Cruzado. And he also—Well, in conclusion, we would like to submit that in light of the victim's right to claim no one has claimed restitution here nor feel that Mr. Cruzado should remain incarcerated. The Assistant U.S. Attorney here has not brought any witnesses to testify as to why he should get the higher end of the range.

THE COURT: Witnesses as to what?

MR. ZENO: I'm sorry?

THE COURT: Witnesses as to what?

MR. ZENO: Why Mr. Cruzado should get over 63 months.

THE COURT: Well, I would not allow that. And he knows that.

MR. ZENO: Well, he didn't bring any

witnesses.

THE COURT: I wouldn't allow it.

MR. ZENO: And based on our questioning here was truncated, we don't feel there is any reason this man should stay in jail. He has not done anything that anybody that this Court has sentenced before under the same circumstances has done and we see no reason why he should get a different sentence. And other than that, Your Honor, we have nothing further.

THE COURT: The defendant will be allowed to address the Court if he wishes, but it has to be within the confines of what an allocution is and I will not allow him to repeat the allocution that he gave me before on two occasions.

New matters that he wants me to consider on issues of where should I sentence him in the guideline range, I would love to hear him on that.

MR. ZENO: Your Honor, I have not seen his allocution.

THE COURT: That is fine.

MR. ZENO: So we will see.

THE DEFENDANT: Good morning, Your Honor. Judge Fuste. Good morning to all my relatives and to all those present. I would like to take advantage of this situation to congratulate my parents who are there somewhere, who turned 85 this weekend.

(Defendant reads allocution in Spanish)

MR. GIL: I object.

THE COURT: I am going to sustain this. I am going to allow you to address the Court on issues that will --

THE DEFENDANT: I don't have the right to

free speech in this Court. I don't have the right to present evidence here that this gentleman fabricated a dirty case against me with false evidence.

THE COURT: Let me do this. I will allow you to continue,

Go ahead.

THE DEFENDANT: Okay.

(Defendant gives allocution in Spanish)

THE DEFENDANT: Thank you, Your Honor, for allowing me to give my allocution.

THE COURT: Would you please take over the papers for copying.

MR. ZENO: Your Honor --

THE COURT: Let me get this straightened out first.

Make certain they are in order.

MR. ZENO: Can we do this later.

THE COURT: No. Let's do it now. Let's do things in the correct order.

MR. ZENO: Okay.

THE COURT: We are going to, of course, photocopy them and return them to counsel afterwards.

THE DEFENDANT: Thank you, sir.

THE COURT: I am aware of the fact that at trials during the allocution Mr. Cruzado departed from the written text of his presentation, but the best I can do at this stage is to have the record contain an idea of what the allocution was about is for you to translate it into the record.

THE INTERPRETER: Okay.

Then, of course. Would you please do that.

THE COURT: Do you mind, Mr. Zeno, if the Court interpreter is allowed to type the allocation

and have it filed in black and white?

MR. ZENO: No, Your Honor, as long as it is attached.

THE COURT: And what we are going to do is this, you are going to take the document. We are going to mark it as an exhibit to this sentencing hearing.

It is going to be Exhibit 2. Once you have transcribed it and certified it you will file with Becky.

THE COURT: Then, Becky will return the original of the document or a copy of the document, a copy of the document to Mr. Zeno so that Mr. Cruzado can keep a copy of that and then the original will be made part of the record.

So you will take over the document now.

MR. ZENO: He made reference to that document.

THE COURT: You can append that document if you want.

MR. ZENO: There is no need to translate the whole thing.

THE DEFENDANT: Your Honor, the only question about that document is included in the questions of Mr. Saldaña.

THE COURT: That is fine. Tommy, you will make it part of the record as soon as practicable.

MR. ZENO: Your Honor, as to the argument that I intended to make to this Court, this Court did not allow us to do that because we were not allowed to put on the witnesses.

THE COURT: You can make it part of Exhibit 1. Give it to the clerk.

(Defendant's Exhibit 1 and 2 marked for

identification and received into evidence)

And now, counsel, will you please approach the bench a minute.

(Bench conference)

THE COURT: Mr. Gil, you have a right to make your allocution.

MR. GIL: It is going to take me like 20 seconds.

THE COURT: I don't want you to do anything other than what is proper under the circumstances, no matter how much you have to swallow; is that clear?

MR. GIL: No problem.

THE COURT: Mr. Gil.

MR. GIL: Your Honor, like all of us have listened to the defendant here for, I think, close to an hour make his allocution.

I have to say only one thing. Of all the things that he said I agree with one. One thing that he said. And that is that no one is above the law, including Mr. Cruzado. And I think this Court made an assessment back then when we first sentenced this defendant within that guideline range. The Court sentenced him to 63 months. In second time around we went through this process again. And I recommended to the Court, although the Court had a bigger range, it could have imposed, based on that calculation we made, up to 78 months. I asked the Court to impose the same sentence of 63 months. And that is exactly what I am asking today, for the Court to impose the same sentence.

THE COURT: Very well.

Thank you.

Well, let me try to get my act together here

and make some sentencing findings which is important so we can conclude this hearing.

Back in June of 2002 a duly impanelled jury, after a full-blown trial entered a verdict of guilty in this case against Mr. Cruzado. He was found guilty of one count of aiding and abetting in theft concerning a program receiving federal funds in violation of a Continuous Code Section 666 (A) (1) (A) and also the aiding and abetting status, Continuous Code Section 2, if I remember correctly, and perhaps I am wrong, but I think I am correct, this was count one.

Then he had five counts where he was found guilty of interference with commerce by extortion induced by economic fear and under color of official right in violation of the Hobbs Act, a Continuous Code Section 1951. That would be counts 2, 4, 6. I think, 13 and 14.

There were also five counts of aiding and abetting in money laundering in violation of Section 1956 of Title 18, specifically Section 1956 (A) (1) (B) (I). And two counts—and then counts 3, 5, 7, 8 and 9 and a count of witness tampering that was also in violation of a Continuous Code Section 1512 (B) (1) (2).

I don't think there is any disputes about the counts of conviction. I think everybody is in agreement those were the counts irrespective of how fair or unfair the convictions were. Those were the counts.

For the conviction of theft concerning the programs receiving federal funds the statutory maximum was 30 years under Continuous Code Section 666. For the convictions involving money

laundering and interference with commerce induced by economic fear and under color of official right the maximum sentence we know is 20 years per count of conviction.

Finally, for conviction of witness tampering, there was a maximum of one year imprisonment. The maximum fine was $250,000, although not really $250,000. I think it was 500,000 because of the fact that 1956 brings about a maximum fine of 500,000. But that is immaterial because no fine in this case will ever exceed those limits.

Supervised release, we already know, is at least two, not more than three years.

When you combine the offenses all together, although one of the offenses in particular has a maximum of one year of supervision.

The case went to the Court of Appeals a couple of times. It went originally after the conviction. And it went back after resentencing. The last time we—As we have already said—We used a base offense level of 26 and that brought about a guideline imprisonment range of 63 to 78 months.

Now, we know we have discussed this at the beginning of the hearing the offense level should be 24. The criminal history category should be one and the imprisonment range should be 51 to 63 months. The fine range is 10,000 to 500,000, two to three years of supervised release. There is no dispute about that either.

So, where in that guideline range are we going to sentence Mr. Cruzado? I should consider, I think, the sentencing factors that appear in Continuous Code Section 3553 (A). Even though this is not a

nonguideline sentence this is an advisory guideline sentence. Among those factors the Court has to consider the characteristics of the defendant. That is what the statute says. I should consider the seriousness of the offense. I should consider the need for just punishment and deterrence, the protection of the public and the defendant's need for medical care or other correctional treatment. And those are sentencing factors that are contained in the law and also contained in the case law.

In this case the following must be considered at the time of imposing the sentence. We do think, with due respect to Mr. Cruzado's beliefs as to this case, that his offense was serious and was egregious and that a term of imprisonment was justified for the 11 extortion, money laundering and theft offenses for which he was convicted.

We all know that Mr. Cruzado was an elected official. He was a mayor of a municipality, and as he mentioned, not even a year had elapsed after he took office, 10 months he said. Unfortunately and sadly, he used his public position in a situation that resulted in the extortion and laundering of money by demanding kickbacks of municipal contracts from various contractors and by redirecting funds intended for the municipality into his own pocket.

Mr. Cruzado laundered, extorted or diverted money through various means which included his own bank account, his old check cashing business that he had. It was like an exchange house that you people would go and cash checks there. I think his son worked there, for some reason. That is my recollection of the evidence. And the account also of his wife's dental practice. She was a dentist. He

used her account also.

In addition to extorting a number of funds he attempted to tamper with three potential witnesses during the course of the investigation. All after he was indicted and the Court of Appeals so affirmed in one of the decisions.

The Court has to consider this conviction. The Court has to consider the several opportunities that we have given the defendant to express remorse for his conduct. But, sadly, he has failed to do so. I assure Mr. Cruzado had he admitted his involvement in the offense conduct I would have been the first one, even on the third resentencing, to give him the full benefit, the full benefit, of what the law says I should give him by way of reduction in the base offense level. But, unfortunately, that is not the case.

At some point in time during the allocution I made the decision to stop him because I thought the allocution was totally out of line with what an allocution should be. But I decided to let him go and finish because, deep in my heart, I had the hope that he would, perhaps, recognize the fact that the good thing for him would have been to express remorse, et cetera.

Anyway, that did not happen. So where should I sentence the defendant under these circumstances? I do think if we are going to consider the seriousness of what happened in this case and we are going to consider the state of affairs in this case as of today, the only thing to do, the only proper thing to do would be to sentence him at the same level we sentenced him before, which is the 63 months.

So the same level of fine that we imposed before and with the same restitution that we imposed before.

The fine was not the object of appeal or if it was the Court of Appeals did not touch it. The restitution falls within the same category. So the bottom line on a base offense level of 24, a criminal history category of one and imprisonment range of 51 to 63 months.

The sentence should be 63 months. The supervised release should be three years under the same specific terms and conditions previously imposed during the last sentence and the first sentence. And the fine range should be the same one. Between, 00 and 200,000 it should be 10, which is what we imposed before with the same specific restitution.

Regarding the returning of the defendant to the place where he was originally sentenced, I am going to order the U.S. Marshal's Service to return him on a special trip back to the facility where he was serving. And I will make certain that that is done effective immediately unless counsel wants me to make a recommendation that he finishes his sentence at MDC.

You decide.

MR. ZENO: Just one second, Your Honor. Your Honor, we would like you to recommend that he stay at MDC.

THE COURT: The recommendation is going to be the following: That he be allowed to finish his sentence at MDC Guaynabo in Puerto Rico. And that if, for some reason, the Bureau of Prisons decides, because that is up to them to decide where

he will finish, completing his finish, they decide he should go back to the prison where he was in the states, then I will insist and I will order that the Marshal Service makes a special trip with him and take him back directly to the prison where he was—where he came from originally without this touring around the whole nation back and forth on a Bureau of Prisons plane, which I don't think is a fair thing to do.

You have the right to appeal the sentence imposed. The notice of appeal should be filed within 10 days from today. You also have the right to appeal in forma pauperis. You also have the right to have the attorney's fees paid by the government on appeal under the fund of the Criminal Justice Act.

Anything else?

PROBATION OFFICER: Your Honor, may I approach.

THE COURT: Yes. Please. The Probation officer reminds me there is a technical issue that I should say and clarify. Although I think I said it because I was imposing the same term of imprisonment as before, she wants to be extra cautious. She wants me to say that it is 63 months as to each count except count 11, for which there will be an imprisonment term of one year because that is the maximum. Said terms to be served concurrently with each other. I think that has been said before, but just in case it is said again.

Anything else?

Thank you very much you are now excused.

Thank you very much.

THE DEPUTY MARSHALL: All rise.

(Whereupon Court adjourned at 12:00 p.m.)

- - - - -

REPORTER'S CERTIFICATE

I, YVETTE RICHARDSON, Official Court Reporter in the United States District Court for the District of Puerto Rico, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of the proceedings had in the within entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared under my direction.

Whereunto I have set my hand this 5th day of September 2006

_____

YVETTE RICHARDSON, CSR, OCR
Official Court Reporter

STATUTORY PROVISIONS

Section 2106 of Title 28 of the United States Code provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Section 3553(a) of Title 18 of the United States Code provides:

> **Factors To Be Considered in Imposing a Sentence.**— The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> **(1)** the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> **(2)** the need for the sentence imposed—
>
> **(A)** to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994 (a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994 (p) of title 28); and

(ii) that, except as provided in section 3742 (g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994 (a)(3) of title 28, United States

Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994 (p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994 (a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994 (p) of title 28); and

(B) that, except as provided in section 3742 (g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

DEC 9 - 2008
OFFICE OF THE CLERK

No. 08-444

In the Supreme Court of the United States

JUAN M. CRUZADO-LAUREANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a court of appeals may adopt a rule that resentencing on remand is presumptively limited, not presumptively de novo, when the court of appeals affirms a conviction and remands for correction of a discrete, specific sentencing error, but does not otherwise specify whether the remand is limited.

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In the Supreme Court of the United States

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JUAN M. CRUZADO-LAUREANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 527 F.3d 231. Two earlier opinions of the court of appeals (Pet. App. 18-62, 63-76) are reported at 404 F.3d 470 and 440 F.3d 44, respectively.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2008. On August 26, 2008, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including October 2, 2008, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted in the United States District Court for the District of Puerto

Rico of one count of embezzling from a program receiving federal funds, in violation of 18 U.S.C. 666(a)(1)(A)(i) and (ii); five counts of extortion, in violation of 18 U.S.C. 1951(a); five counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i) and (ii); and one count of witness tampering, in violation of 18 U.S.C. 1512(b)(1) and (2). He was sentenced to 63 months of imprisonment, to be followed by a three-year term of supervised release. He was also fined $10,000 and ordered to pay restitution in the amount of $14,251.82. The court of appeals affirmed the convictions but vacated the sentence and remanded for resentencing. Pet. App. 18-62. On remand, the district court imposed the same sentence. The court of appeals again vacated the sentence and remanded for resentencing. *Id.* at 63-76. On remand, the district court again imposed the same sentence. The court of appeals affirmed. *Id.* at 1-17.

1. In November 2000, petitioner was elected mayor of Vega Alta, a municipality in Puerto Rico. Pet. App. 20, 65. Almost immediately after taking office, petitioner began extorting and laundering money by, among other things, demanding kickbacks on municipal contracts and redirecting funds intended for the municipality into his own pocket. *Id.* at 21, 65. Petitioner would clear the extorted money through his own bank account, through a check-cashing business he had previously owned (but which had been taken over by his son when he became mayor), or through accounts at his wife's dental practice. *Id.* at 21-34, 65.

In 2001, the Federal Bureau of Investigation began investigating petitioner's conduct. Pet. App. 35, 65. During the investigation and after an initial indictment was handed down, petitioner attempted to tamper with three potential witnesses against him. *Ibid.*

2. a. A grand jury in the United States District Court for the District of Puerto Rico charged petitioner with one count of embezzling from a program receiving federal funds, in violation of 18 U.S.C. 666(a)(1)(A)(i) and (ii); six counts of extortion, in violation of 18 U.S.C. 1951(a); six counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i) and (ii); and one count of witness tampering, in violation of 18 U.S.C. 1512(b)(1) and (2). Pet. App. 35, 60-62, 66.

After a jury trial, petitioner was convicted of all counts against him except for one money-laundering count (on which the district court had granted a judgment of acquittal) and one extortion count (on which the jury returned a verdict of not guilty). Pet. App. 36.

In November 2002, the district court sentenced petitioner to 63 months of imprisonment, imposed a fine of $10,000, and ordered restitution in the amount of $14,251.82. Pet. App. 3, 36.

b. Petitioner appealed, challenging the sufficiency of the evidence supporting his convictions and arguing that his sentence was erroneously calculated. The court of appeals affirmed the convictions, Pet. App. 37-56, but it held that the district court plainly erred in sentencing petitioner under the 2000 edition of the Sentencing Guidelines instead of the 2002 edition, *id.* at 56-62. The court thus vacated the sentence and remanded for resentencing under the correct edition of the Guidelines. *Id.* at 58-62.

3. a. On remand, the district court performed the sentencing calculation anew under the 2002 edition of the Sentencing Guidelines. Pet. App. 66-69.

To establish the base offense level for a money-laundering offense, Section 2S1.1 of the Sentencing Guidelines uses the total offense level for the offense underly-

ing the money laundering. The district court thus started with a base offense level of ten (which is specified in Section 2C1.1(a) of the Guidelines as the base offense level for extortion under color of official right). Pet. App. 68. It then applied a two-level enhancement under Section 2C1.1(b)(1), because the offense involved more than one incident of extortion, and an eight-level enhancement under Section 2C1.1(b)(2)(B), because the extortion involved a payment for the purpose of influencing an elected decision-making official. *Ibid.* The final offense level under Section 2C1.1 was thus 20. Under Section 2S1.1(a), level 20 became the base offense level for calculating the advisory Guidelines range for money laundering. *Ibid.* The court then applied an additional two-level enhancement under Section 2S1.1(b)(2)(B) because the offense involved a conviction under the money-laundering statute, 18 U.S.C. 1956. Pet. App. 68.

The court then turned to the general-purpose adjustment provisions in Chapter Three of the Guidelines. Pet. App. 68. It applied a two-level enhancement for abuse of a position of public trust under Section 3B1.3, and another two-level enhancement for obstruction of justice under Section 3C1.1. *Id.* at 69. Petitioner's total offense level was 26, and with a criminal history category of I, the resulting advisory Guidelines range was 63 to 78 months. *Ibid.* The district court imposed the same 63-month sentence it had previously imposed. *Ibid.* It also imposed the same fine and ordered petitioner to pay the same amount in restitution. *Id.* at 3.

b. Petitioner appealed for a second time, challenging the district court's application of several provisions of the Guidelines. The court of appeals again vacated the sentence and remanded the case for resentencing. Pet.

App. 63-76. The court rejected petitioner's claims that the district court erred in giving him an eight-level enhancement under Section 2C1.1(b)(2)(B) and in applying the specific-offense-characteristics provisions of Section 2S1.1(b) after it had finished its Section 2C1.1 calculations. *Id.* at 70-73. The court, however, agreed with petitioner that the district court had erred in applying a two-level abuse-of-trust enhancement, because that enhancement is not available where any other provision that increases a sentence for holder of high public office already applies.[1] *Id.* at 73-76. That was the case here: the district court had applied Section 3B1.3 because petitioner had used the power of his high office in extorting and embezzling funds, and abuse of high office was the same concern that justified an eight-level enhancement under Section 2C1.1(b)(2)(B). *Id.* at 73-74.

In his appeal, petitioner also challenged the district court's order requiring payment of restitution and a fine and ordering supervised release. Pet. App. 70 n.7. The court of appeals, however, held that petitioner's arguments were "too perfunctory" to permit the court "to evaluate the merits of those aspects of his punishment." *Ibid.* (citing *United States* v. *Zannino*, 895 F.2d 1, 17 (1st Cir.) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."), cert. denied, 494 U.S. 1082 (1990)).

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[1] Section 3B1.3 calls for an offense level increase "[i]f the defendant abused a position of public or private trust * * * in a manner that significantly facilitated the commission or concealment of the offense." Sentencing Guidelines § 3B1.3. It states, however, that "[t]his adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic." *Ibid.*

The court of appeals again remanded the case for resentencing, stating that it was sending the case back to the district court because it had "determined that the court's interpretation of the Guidelines was legally erroneous." Pet. App. 76. The court also expressly noted that it did "not intend to intimate that the length of the sentence should necessarily be changed; what matters is that the premise as to the Guideline range must be correct." *Ibid.*

4. a. The resentencing hearing was held in April 2006. Pet. App. 77-117. Petitioner and the government agreed on the criminal history category (I) and the total base offense level (24), which resulted in an advisory Guidelines range of 51 to 63 months of imprisonment. *Id.* at 4, 80.

Petitioner argued at the hearing that the district court could reconsider all aspects of his sentence, including restitution, because the court of appeals had not explicitly limited the remand to a reassessment of the correct term of imprisonment without the abuse-of-trust enhancement. Pet. App. 88-90. He also sought to present witnesses to prove that he was "actually innocent," that he had been subject to malicious prosecution, and that there were no victims of his crime—and hence no need for restitution—because no loss had occurred. *Id.* at 82-87.

The district court determined that it could consider only the appropriate sentence within the corrected Guidelines range. Pet. App. 90-106; see *id.* at 4. The court stated that "[t]his sentencing hearing is for one specific purpose" and that "[t]here is a mandate by the Court of Appeals as to the two points that were improperly, according to the Court of Appeals, i[m]properly adjudicated to this defendant." *Id.* at 88. The court

added that petitioner challenged the restitution amount before the court of appeals and the court of appeals "did not enter that at all." *Id.* at 89. Thus, the court stated, "I don't think the issue of restitution is open at this stage of the proceedings." *Id.* at 90. The court agreed, however, to hear character testimony from four witnesses, and it allowed petitioner to submit the questions his counsel had planned to ask of those witnesses and the five additional witnesses he had wanted to call. *Id.* at 90-106; see *id.* at 4.

At the close of the hearing, the court reiterated that "[t]he fine was not the object of appeal or if it was the Court of Appeals did not touch it" and "[t]he restitution falls within the same category." Pet. App. 114. The court then applied the factors in 18 U.S.C. 3553(a) and again imposed a 63-month sentence and also re-imposed the same amount of restitution ($14,251.82) and the same fine ($10,000). Pet. App. 111-114; see *id.* at 4.

b. Petitioner appealed a third time, arguing, among other things, that the district court improperly limited the scope of the resentencing hearing to a decision on the appropriate term of imprisonment within the recalculated Guidelines range. The court of appeals rejected that claim, stating that, while "some circuits do generally allow de novo resentencing on remand," the First Circuit does not. Pet. App. 6; see *ibid.* (quoting *United States* v. *Ticchiarelli*, 171 F.3d 24, 32 (1st Cir.) ("[U]pon a resentencing occasioned by a remand, unless the court of appeals [has expressly directed otherwise], the district court may consider only such new arguments or new facts as are made newly relevant by the court of appeals' decision—whether by the reasoning or by the re-

sult.") (internal quotation marks omitted), cert. denied, 528 U.S. 850 (1999)).[2]

The court also rejected petitioner's assertion that even if a de novo resentencing was barred, the district court should have made new findings on the restitution and fine amounts because they are integral elements of every sentence and are thus within the exception carved out for matters "made newly relevant by the court of appeals' decision." *Ticchiarelli*, 171 F.3d at 32 (internal quotation marks and citation omitted). The court observed that petitioner contested restitution at his second sentencing hearing and had challenged both restitution and the fine in his prior appeal, but the court had "deemed those challenges waived because the claims were inadequately developed." Pet. App. 7. It explained that "[t]he need to correct the abuse-of-trust error" arising from its prior opinion had "not given new merit to his opposition to those assessments." *Ibid.* The court also concluded that petitioner's other arguments—that restitution was improper because no victim had a loss and that a fine was improper because he had no resources to pay it—were "unrelated to the abuse-of-trust issue and had no relationship to the issue" that had been before the district court on remand, which the court of appeals described as "the appropriate length of the sentence under the Guidelines." *Ibid.*[3]

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[2] Petitioner acknowledged that *Ticchiarelli* foreclosed his argument in the court of appeals, but stated that he was preserving the issue for review by this Court. Pet. App. 6-7.

[3] The court of appeals likewise disagreed with petitioner that, given the lower base offense level resulting from his second appeal, the district court should have considered imposing lower amounts of restitution and fine. Petitioner's counsel acknowledged at the sentencing hearing that the fine imposed ($10,000) was the lowest point of a range

The court of appeals thus held that the district court had properly limited the scope of the third sentencing hearing to a consideration of the appropriate sentence in light of the applicable advisory Guidelines range, and that the court of appeals' own review was also restricted to issues related to petitioner's term of imprisonment. Pet. App. 8.[4]

ARGUMENT

Petitioner renews (Pet. 8-24) his claim that the district court improperly declined to reconsider his entire sentence, including the amount of restitution ordered, where the case was remanded for resentencing because of a discrete, specific error in applying the Sentencing Guidelines. Petitioner points to a disagreement among the courts of appeals on whether resentencing after a remand is presumptively de novo or presumptively limited to correcting the errors found on appeal. Pet. 9-19. He urges the Court to grant certiorari and adopt the former rule. Pet. 19-24.

Review by this Court is not warranted. Because Congress has authorized the courts of appeals to limit a remand in a sentencing case as the court deems appropriate, and has authorized each court of appeals to adopt local rules of practice, there is no need for this Court to

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that went up to $500,000, and the restitution order was based on specific findings of loss rather than sentencing ranges under the Guidelines. Pet. App. 8.

[4] The court of appeals also rejected petitioner's claims that the district court had impermissibly double-counted his lack of acceptance of responsibility, that he should have been allowed to present victim testimony in mitigation of his punishment, and that bias on the part of the sentencing judge denied him due process, requiring resentencing before a different judge. Pet. App. 8-17. Petitioner has not renewed those claims in this Court.

adopt a uniform default rule to govern the scope of resentencing after remand when the court of appeals has not otherwise specified the extent of review on resentencing. Even if there did need to be a uniform default rule, this is not an appropriate case to establish one, because the result in petitioner's case would not be altered under the rule that he advocates. This Court has repeatedly declined to grant review in cases presenting the question raised by petitioner, and there is no reason for a different result here.[5]

a. Under 28 U.S.C. 2106, a court of appeals may "affirm, modify, vacate, set aside or reverse any judgment, decree, or order" of the court whose decision it is reviewing, and may "remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." In addition, the statute governing sentencing appeals provides that, when a court of appeals finds a sentencing error, it must "remand the case for further sentencing proceedings *with such instructions as the court considers appropriate*." 18 U.S.C. 3742(f)(1), (2)(A) and (2)(B) (emphasis added). The statute also provides that, on remand, a district court shall resentence a defendant in accordance with 18 U.S.C. 3553 and with "such instructions as may have been given by the court of appeals." 18 U.S.C. 3742(g).

It is thus well settled that, after a court of appeals has reversed the judgment in a criminal case, it has au-

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[5] See, *e.g.*, *Tocco* v. *United States*, 539 U.S. 926 (2003) (No. 02-1225); *Donato* v. *United States*, 539 U.S. 902 (2003) (No. 02-1191); *Hass* v. *United States*, 531 U.S. 812 (2000) (No. 99-1694); *Harris* v. *United States*, 525 U.S. 1148 (1999) (No. 98-6358); *Marmolejo* v. *United States*, 525 U.S. 1056 (1998) (No. 98-5372); *Whren* v. *United States*, 522 U.S. 1119 (1998) (No. 97-6220).

thority to provide either for de novo resentencing or for a limited resentencing. See, *e.g.*, *United States* v. *Moore*, 131 F.3d 595, 597-598 (6th Cir. 1997); *United States* v. *Santonelli*, 128 F.3d 1233, 1238 (8th Cir. 1997); *United States* v. *Webb*, 98 F.3d 585, 587 (10th Cir. 1996), cert. denied, 519 U.S. 1156 (1997); *United States* v. *Polland*, 56 F.3d 776, 777 (7th Cir. 1995); *United States* v. *Pimentel*, 34 F.3d 799, 800 (9th Cir. 1994), cert. denied, 513 U.S. 1102 (1995). It is also well settled that, except perhaps in extraordinary circumstances, a district court conducting a resentencing must act in conformity with the mandate of the court of appeals. See, *e.g.*, *Moore*, 131 F.3d at 598; *Webb*, 98 F.3d at 587; *United States* v. *Tamayo*, 80 F.3d 1514, 1519-1520 (11th Cir. 1996); *Polland*, 56 F.3d at 777-779; *Pimentel*, 34 F.3d at 800; *United States* v. *Bell*, 5 F.3d 64, 66-67 (4th Cir. 1993). The courts of appeals are thus in agreement that they have discretion to determine the scope of a resentencing and that a district court is obligated to follow the directions of the court of appeals when conducting the resentencing. Although petitioner makes policy arguments (Pet. 19-24) on why resentencing should presumptively be de novo, he does not suggest that there is any constitutional or statutory right to de novo resentencing, and he does not question Congress's authority to allow a court of appeals to decide whether resentencing should be de novo or limited.

There is, however, disagreement among the courts of appeals on the narrow question of the proper scope of a resentencing when the court of appeals gives no indication as to the intended scope of proceedings on remand. Some courts of appeals have held that resentencing in such cases is limited to the correction of the errors found on appeal. See *United States* v. *Pineiro*, 470 F.3d

200, 205-207 (5th Cir. 2006); *United States* v. *Quintieri*, 306 F.3d 1217, 1227 (2d Cir. 2002), cert. denied, 539 U.S. 902 (2003); *Ticchiarelli*, 171 F.3d at 32; *United States* v. *Marmolejo*, 139 F.3d 528, 530-531 (5th Cir.), cert. denied, 525 U.S. 1056 (1998); *United States* v. *Whren*, 111 F.3d 956, 960 (D.C. Cir. 1997), cert. denied, 522 U.S. 1119 (1998); *United States* v. *Parker*, 101 F.3d 527, 528 (7th Cir. 1996).[6] Other courts of appeals have held that resentencing in such cases is de novo. See *United States* v. *Faulks*, 201 F.3d 208, 210 (3d Cir. 2000); *United States* v. *Keifer*, 198 F.3d 798, 801 (10th Cir. 1999); *United States* v. *Stinson*, 97 F.3d 466, 469 (11th Cir. 1996), cert. denied, 519 U.S. 1137 (1997); *United States* v. *Jennings*, 83 F.3d 145, 151, amended, 96 F.3d 799 (6th Cir.), cert. denied, 519 U.S. 975 (1996); *United States* v. *Ponce*, 51 F.3d 820, 826 (9th Cir. 1995); *United States* v. *Cornelius*, 968 F.2d 703, 705 (8th Cir. 1992).

There is no need for this Court to adopt a uniform rule for all the courts of appeals, because the rules con-

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[6] Petitioner asserts (Pet. 10-12 & n.2) that the Second Circuit has adopted the rule that resentencing should be de novo. The Second Circuit, however, has held that no explicit authorization for de novo resentencing is required when one or more counts of conviction have been overturned on appeal, while explicit authorization for de novo resentencing is required when all convictions are affirmed but the court finds a "specific sentencing error." *United States* v. *Quintieri*, 306 F.3d 1217, 1227 (2002), cert. denied, 539 U.S. 902 (2003). Petitioner cites (Pet. 10 n.2) *United States* v. *Atehortva*, 69 F.3d 679, 685 (2d Cir. 1995), cert. denied, 517 U.S. 1249 (1996), but the Second Circuit has already explained that "*Atehortva*'s holding is properly limited to cases where one or more convictions have been vacated and we have remanded for resentencing on the remaining counts." *Quintieri*, 306 F.3d at 1227. See *id.* at 1228 ("absent explicit language in the mandate to the contrary, resentencing should be limited when the Court of Appeals upholds the underlying convictions but determines that a *sentence* has been erroneously imposed and remands to correct that error").

cerning resentencing on remand might appropriately be viewed as local rules that can differ from circuit to circuit. So long as such local rules are reasonable, see *Thomas* v. *Arn*, 474 U.S. 140, 146-148 (1985), and consistent with Acts of Congress and the Federal Rules of Appellate Procedure, see Fed. R. App. P. 47(a), there is no requirement that there be "uniformity among the circuits in their approach to [these] rules." *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 251 n.24 (1993).[7]

b. Even assuming there ought to be a uniform default rule governing resentencing when the court of appeals has otherwise failed to specify whether the remand is limited, this is not an appropriate case for the Court to establish such a default rule, because the Court's decision would not affect petitioner's sentence.

Petitioner contends that the presumption in the First Circuit is that resentencings are limited (Pet. 8); that the presumption was applied in this case (*ibid.*); and that the result would have been different if he had been sentenced in a number of other circuits (Pet. 19-21). Petitioner is correct on the first point, but mistaken on the second and third. It is true that the rule in the First Circuit is that resentencings are presumptively limited. See *Ticchiarelli*, 171 F.3d at 32. As explained below,

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[7] Two courts of appeals have suggested a connection between the court's rule concerning the scope of resentencing on remand and the provision of Fed. R. Crim. P. 32(i)(1)(D) that allows new claims to be raised at any time before the imposition of sentence "for good cause." See *United States* v. *McCoy*, 313 F.3d 561, 564-567 (D.C. Cir. 2002) (en banc); *United States* v. *Moore*, 83 F.3d 1231, 1235 (10th Cir. 1996). To the extent that a court of appeals considers its rule on the scope of resentencing to be compelled by the Federal Rules of Criminal Procedure, it could not properly be viewed as a local rule of practice.

however, the presumption was not necessary in this case. Instead, resentencing was specifically limited by the court of appeals. Because the remand was for a limited, rather than de novo, resentencing, the result here would have been the same in a circuit where resentencings are presumptively de novo.

In the second appeal in this case, the court of appeals remanded after stating that it had "determined that the court's interpretation of the Guidelines was legally erroneous." Pet. App. 76. The court added that the issue for resentencing on remand was "that the premise as to the Guideline range must be correct." *Ibid.* Thus, the court of appeals made clear that it was remanding for the limited purpose of correcting the specific Guidelines error (application of a two-level abuse-of-trust enhancement) and resentencing in light of the corrected advisory Guidelines range. That the court of appeals did not make that more explicit in its remand order does not defeat the inescapable conclusion that it remanded for correction of a discrete sentencing error. See, *e.g.*, *Quintieri*, 306 F.3d at 1227 ("to determine whether a remand is *de novo*, we must look to both the specific dictates of the remand order as well as the broader spirit of the mandate") (internal quotation marks and citation omitted); *ibid.* (where court of appeals opinion "identified a specific sentencing error, remanded because of that error, and decided that all other claims were without merit," the remand is not for de novo resentencing); *United States* v. *Genao-Sanchez*, 525 F.3d 67, 70 (1st Cir. 2008) ("In interpreting the mandate, the district court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces.") (internal quotation marks and citation omitted); *Pineiro*, 470 F.3d

at 205 ("When on remand the district court assays to implement the mandate, it must proceed within the letter and spirit of the mandate by taking into account the appeals court's opinion and the circumstances it embraces.").[8]

The district court here acknowledged the limited scope of the mandate on remand (Pet. App. 88-90) and resentenced petitioner accordingly (*id.* at 111-114). Thus, because the court of appeals indicated that resentencing in this case was to be limited, the question that has divided the courts of appeals—what the default rule should be when the court of appeals does not specify whether resentencing should be de novo or limited— is not presented here and further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2008

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[8] Because district courts—even in circuits that apply the rule petitioner endorses—will always need to determine whether the mandate includes a limitation on the scope of resentencing, petitioner is mistaken in saying (Pet. 20-21) that, by changing the default rule, this Court could save district courts in "hundreds of cases each year" from having to "assess the extent of [their] power" on resentencing.

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No. 08-444

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IN THE

United States Supreme Court

JUAN M. CRUZADO-LAUREANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Government concedes that the courts of appeals are split on the question presented by this petition, and does not dispute that the split is mature, intractable, and longstanding. The Government nevertheless advances two circular arguments that ignore the basis for Mr. Cruzado's challenge. Neither of these arguments is a basis for denying Mr. Cruzado's petition.

First, the Government argues that this Court should ignore a longstanding circuit split on a fundamental and pervasive question about the power of district courts on sentencing because the applicable laws "might appropriately be viewed as local rules" of practice in each circuit. Opp. 13. Far from it. The question presented addresses the appropriate interpretation of the federal sentencing statutes, including 18 U.S.C. §§ 3553(a) and 3742(g). That is why the courts themselves do not treat this as local rule.

Second, the Government argues that Mr. Cruzado's case is not an appropriate vehicle for this Court to resolve the question presented because the result would be the same under either rule. Opp. 14. According to the Government, the court of appeals expressly limited its mandate in *Cruzado II*. To the contrary, the court of appeals in *Cruzado II* did not limit the mandate in any way, and neither the district court, on remand, nor the Court of Appeals in *Cruzado III*, suggested that they thought the mandate had been expressly

limited. They purported only to apply the First Circuit's blanket rule that remands are necessarily limited by default. Thus, this case presents an appropriate vehicle for this Court to resolve the circuit split.

I. THE SCOPE OF RESENTENCING ON REMAND IS AN ISSUE OF SUBSTANTIVE FEDERAL LAW, NOT A "LOCAL RULE."

The Government begins its opposition with the suggestion—presented ever so tentatively—that the minority approach "might appropriately be viewed as local rules." Opp. 13. In hedging in this manner, it is not clear whether the Government is saying (A) that this might not be an appropriate matter for a local rule or (B) that the courts of appeals might not, in fact, be treating this as a local rule. The truth is the Government's hypothesis must be rejected on both grounds.

A. The Scope of Resentencing on Remand Is Governed by Federal Law.

This case is not about local practice. It is about the interpretation of two federal statutes and a federal rule, the inherent power of district courts on sentencing, and the substantive rights of thousands of criminal defendants.

The federal statute governing resentencing on remand requires district courts to "resentence a defendant in accordance with Section 3553 and with such instructions as may have been given by the court of appeals." 18 U.S.C. § 3742(g). In turn, 18 U.S.C. § 3553, which governs the discretion of

sentencing courts, *requires* those courts to consider seven enumerated factors before determining a defendant's sentence. *Id.* § 3553(a)(1)–(7). And Federal Rule of Criminal Procedure 32 directs that a district court "may, for good cause, allow a party to make a new objection at any time before sentence is imposed"—without regard to whether the court of appeals expressly authorized it.

Thus, the issue presented for review is not which approach to resentencing is superior as a matter of docket management or efficient administration of justice. *Cf. Ortega-Rodriguez v. United States*, 507 U.S. 234, 257 (1993) (Rehnquist, C.J., dissenting) (stating that "courts of appeals have supervisory authority, both inherent and under Rule 47, to create and enforce procedural rules designed to promote the *management of their docket*" (emphasis added)). Rather, it is about how to interpret federal law. Petitioner's argument is that when the First Circuit—and other courts adopting the minority view—hold that district courts at resentencing lack discretion to address any issues not specifically authorized by the remanding court's opinion, including issues bearing upon the § 3553(a) factors, these courts misread the sentencing statutes. Simply put, the argument is that the default rule in the minority circuits contravenes §§ 3742(g) and 3553(a) by preventing district courts from following the dictates of § 3553, *even in the absence of express instructions* from the courts of appeals.

The question presented also implicates the appropriate role of sentencing courts, *see Kimbrough v. United States*, 128 S. Ct. 558, 574 (2007) (stating that the sentencing judge is "in a superior position to find facts and judge their import under § 3553(a)"), and the substantive rights of criminal defendants.

Thus, even if the courts of appeals treated this issue as a matter of local rule, the conflict between the rule applied by the minority circuits and federal law should not be overlooked on the grounds of judicial rulemaking authority. After all, the rule authorizing local rules itself directs that "[a] local rule must be consistent with . . . Acts of Congress and rules adopted under 28 U.S.C. § 2072." Fed. R. App. Proc. 47. Thus, "[e]ven a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions." *Thomas v. Arn*, 474 U.S. 140, 148 (1985).

B. The Courts of Appeals Do Not Treat this Issue as a "Local Rule."

The truth is that the courts of appeals do not treat this issue as a matter of local rule. To begin with, not a single one of the circuit courts—on either side of the split—has promulgated its approach through the formal rulemaking process outlined in Federal Rule of Appellate Procedure 47. None of the courts "act[ed] by a majority of its judges in regular active service," and none of them gave "appropriate public notice and opportunity for

comment," before adopting their position. Fed. R. App. P. 47(a)(1).

It is possible, of course, for a circuit to adopt a rule of practice through adjudication rather than the formal rulemaking process, but only under the limited circumstances where (1) "[t]he nature of the rule and its prospective application demonstrates that the court intended to adopt a rule of procedure" in the exercise of the court's supervisory powers; and (2) "[l]ater opinions of the . . . Circuit make it clear that the court views [its precedent] in this way." *Thomas*, 474 U.S. at 145 (internal brackets and citations omitted). Neither condition is satisfied here.

None of the courts of appeals to have weighed in on either side of the split has treated this as a local procedural rule. The First Circuit, for example, views its rule regarding sentencing upon remand as an application of the law of the case doctrine. *See United States v. Ticchiarelli*, 171 F.3d 24, 28–29 (1st Cir. 1999). On the other hand, the Eleventh Circuit concludes that *de novo* resentencing on remand of all aspects of a defendant's sentence, "both proper and improper," is appropriate because of "the need for a sentencing scheme which takes into consideration the total offense characteristics of a defendant's behavior," a concern that reflects the requirements imposed by 18 U.S.C. § 3553(a). *United States v. Rosen*, 764 F.2d 763, 767 (11th Cir. 1985). Similarly, the Tenth Circuit has reasoned that, in light of the requirements of § 3553(a), "the purposes of the federal sentencing scheme would be

frustrated" if the district court were not able to conduct a *de novo* resentencing. *United States v. Hicks*, 146 F.3d 1198, 1203 (10th Cir. 1998). The Tenth and D.C. Circuits have reasoned that the proper scope of resentencing upon remand is dependent in part on the provision of Federal Rule of Criminal Procedure 32. *See United States v. McCoy*, 313 F.3d 561, 564, 565 (D.C. Cir. 2002) (holding that the rules about the scope of sentencing on remand "must be understood in light of [Rule 32]" and that "a proper application of Rule 32 required the district court in resentencing to decide whether [defendant's] failure to raise her [new] argument was 'for good cause shown'"); *United States v. Moore*, 83 F.3d 1231, 1235 (10th Cir. 1996) (stating that after vacation of a sentence, Rule 32 "allows the parties to raise new objections to the presentence report for good cause shown"). None of the decisions on this subject indicates an intention to adopt a local rule of practice pursuant to Federal Rule of Appellate Procedure 47.

* * *

In sum, the question presented is a matter of federal importance, not just a matter of local practice. The Government does not dispute that the correct application of the federal statutory scheme could affect thousands of criminal appeals every year that involve a challenge to the sentence. The issue becomes critical especially as the volume of sentencing appeals has prompted circuit courts to resolve many of these cases in hastily issued memorandum dispositions that may not reflect any

consideration at all of the scope of the district court's authority on resentencing.

Despite the Government's characterization of the question presented as involving a mere local procedural rule, it is as important as the many other federal procedural questions that this Court has resolved. Even where, as here, a lack of uniformity may not lead to forum shopping or other sorts of gamesmanship, it remains important for this Court to resolve disputed questions of federal procedure. *See, e.g., Bowles v. Russell*, 127 S. Ct. 2360 (2007).[1]

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[1] The Government notes that this Court has previously declined to review other cases presenting this question. Opp. 10 n.5. Several of these petitions were decided a decade ago, before all the circuits had weighed in on this issue, and before they had time to reconsider their positions in light of conflicting authority from other circuits. Furthermore, in each of these cases there was a basis for denying certiorari on the ground that the case was not an appropriate vehicle for resolution of the issue. For example, one case was an interlocutory appeal. *See* Brief for United States in Opposition at 6, *Tocco v. United States*, 539 U.S. 926 (2003) (No. 02-1225). In another case, the resentencing court had actually considered and ruled upon several of the new issues raised by the petitioner. *See* Brief for the United States in Opposition at 10, *Donato v. United States*, 539 U.S. 902 (2003) (No. 02-1191). In yet another, the resentencing court ruled that the defendant was not permitted to raise new issues on remand, but nevertheless heard the proffer of new evidence and ruled in the alternative that the new evidence would not have affected the sentence. *See* Brief for the United States in Opposition at 10, *Marmolejo v. United States*, 525 U.S. 1056 (1998) (No. 98-5372). And in three of

II. THE APPROPRIATE DEFAULT RULE AS TO THE SCOPE OF SENTENCING ON REMAND IS SQUARELY PRESENTED IN THIS CASE.

The Government argues that this case is not an appropriate vehicle for resolution of the question presented because the result would have been the same under either rule. Opp. 14–15. According to the Government, that is because "the remand [in *Cruzado II*] was for a limited, rather than *de novo*, resentencing," so even courts in the majority camp would have limited the scope of the district court's discretion on resentencing. *Id.* The Government is mistaken.

As an initial matter, both the district court on remand and the *Cruzado III* panel rejected Mr. Cruzado's argument on the basis of the default rule that is challenged in this petition—the rule the First Circuit articulated in *Ticchiarelli*, 171 F.3d at 32. *See* Pet. App. 7, 90. Neither disposed of the argument on the ground that the remand mandate included limiting language, or in any way suggested that they believed it was limited. That

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the cases, the appellate court had held, or at least the Government had argued, that the issue was not presented, because the remanding court had explicitly and unequivocally limited the remand. *See* Brief for the United States in Opposition at 7, *Hass v. United States*, 531 U.S. 812 (2000) (No. 99-1694); Brief for the United States in Opposition at 6, *Harris v. United States*, 525 U.S. 812 (1999) (No. 98-6358); Brief for the United States in Opposition at 8, *Whren v. United States*, 522 U.S. 1119 (1998) (No. 97-6220).

choice is especially significant, because the court of appeals explicitly noted that Mr. Cruzado was preserving for this Court's review the question whether the First Circuit's default rule was correct. *See* Pet. App. 6–7. If the court of appeals had believed that it had, indeed, explicitly limited the mandate in its earlier ruling, it would undoubtedly have said so and pointed out that the larger issue was not presented.

In any event, the First Circuit's remand order in *Cruzado II* was not expressly limited. The remand stated:

> Having determined that the [district] court's interpretation of the Guidelines was legally erroneous . . . we must again send the case back to the district court. . . . In remanding the case, we do not intend to intimate that the length of the sentence should necessarily be changed; what matters is that the premise as to the Guideline range must be correct.
>
> The sentence imposed by the district court is **vacated** and the case is **remanded** for resentencing.

Pet. App. 76.

Far from limiting the mandate, this language is quite general. In arguing otherwise, the Government focuses exclusively on the language, "we do not intend to intimate that the length of the

sentence should necessarily be changed; what matters is that the premise as to the Guideline range must be correct." Opp. 14 (quoting Pet. App. 76). But that language is more naturally read as an acknowledgment of the district court's discretion to determine the length of Mr. Cruzado's sentence than as a limitation of any sort.

Courts in circuits following the majority approach would never treat this language as limiting. To overcome the presumption that a remand order is general, these courts would require that that the appellate panel express any limitation "specifically," *Hicks*, 146 F.3d at 1201, and "clearly," *United States v. Campbell*, 168 F.3d 263, 267 (6th Cir. 1999), in language that is "*unmistakable*," and that "leave[s] no doubt in the district judge's or parties' minds as to the scope of the remand," *id.* at 268 (emphasis added); *see also United States v. Washington*, 172 F.3d 1116, 1118 (9th Cir. 1999) ("[T]he general practice in a remand for resentencing was to vacate the entire sentence. We will presume that this general practice was followed unless there is 'clear evidence to the contrary.'" (citation omitted)). That means that a remanding court under the majority rule does not overcome the presumption unless it "sufficiently outline[s] the procedure the district court is to follow," articulates "[t]he chain of intended events . . . with *particularity*," *Campbell*, 168 F.3d at 268 (emphasis added), and "create[s] a narrow framework within which the district court must operate," *id.* at 265.

Thus, for example, the Sixth Circuit, which subscribes to the majority view, did not consider a mandate to be limited when the mandate directed that "the defendant's sentence is VACATED and the case REMANDED to the district court for resentencing, consistent with this opinion." *United States v. Obi*, 542 F.3d 148, 154 (6th Cir. 2008). The Ninth Circuit reached the same result when a panel's remand read: "the district court erred in departing from the guidelines based on the quantity of drugs involved. Defendants' sentences should be recalculated accordingly . . . . VACATED and REMANDED." *United States v. Ponce*, 51 F.3d 820, 826 (9th Cir. 1995). Only where the remanding court specifies the precise issue to be resolved do the courts in the majority camp consider the remand limited—where, for example, the appellate court directs that "the case is remanded for resentencing *on the issue of obstruction of justice*." *United States v. Polland*, 56 F.3d 776, 777–78 (7th Cir. 1995) (emphasis added).

The language of the *Cruzado II* remand plainly would not satisfy this stringent standard. There is nothing in the opinion that specifies what limited issue the district court must address, much less that does so clearly and unmistakably.

The Government only proves the point when it concedes that the remand language in *Cruzado II* could have been "more explicit," but nevertheless argues that the language is limiting if read with an eye toward implementing "the letter and the spirit" of the appellate court's mandate. Opp. 14. The

majority rule, with its emphasis on "unmistakable language," *Campbell*, 168 F.3d at 268, would not limit a defendant's resentencing rights based upon the invocation of a "spirit."

Moreover, the Government curiously cites cases only from the *minority* circuits—where remand rights are limited by default—in support of its argument that Mr. Cruzado's remand rights would be limited in *majority* circuits. *See* Opp. 14–15 (citing cases from the First, Second, and Fifth Circuits, all of which apply the minority rule limiting mandates by default). To take one example, the Government quotes the following language from the Second Circuit: "to determine whether a remand is *de novo*, we must look to both the specific dictates of the remand order as well as the broader spirit of the mandate." *United States v. Quintieri*, 306 F.3d 1217, 1227 (2d Cir. 2002). But that was not a basis for finding that the mandate in that case was limited; it was the Second Circuit's argument in support of the *minority* rule that "[t]o allow for *de novo* resentencing in cases [identifying a particular *sentencing* error] would contradict the spirit of the mandate—directing the district court to correct an error or possible error that we had identified in the sentencing—even if the mandate does not expressly state that the resentencing will be limited." *Id.*

The Government's struggle to construe the *Cruzado II* language as limiting further highlights another flaw in its argument, while emphasizing the burden on district courts in minority rule

jurisdictions. The Government suggests that the issue here does not matter because courts must scrutinize the entire appellate court decision in order to make a judgment call about what issues come within the "letter and spirit" of the mandate in any case. Opp. 15 n.8. However, in minority circuits, not only must the district court look for limiting language, even if it finds none, it also must constantly question whether issues that the parties wish to raise are sufficiently related to issues addressed by the appellate court. If the court gets this judgment call wrong, it faces the prospect of reversal on appeal and yet more sentencing proceedings.

In contrast, district courts in majority circuits face a much simpler task. They must read the language of the remanding court's opinion for limiting instructions. But if no limiting language is used, the district court need not struggle to determine what issues are sufficiently related to the issues addressed by the appellate court. Instead, it is left to the district court's discretion to determine what issues to address on resentencing, even if the issues are unrelated to those addressed on appeal.

Either way, uniform application of the majority rule is critical—not only as a matter of interpretation of federal sentencing and criminal procedure laws—but also as a matter of process for hundreds of district court cases each year. In the wake of this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), which greatly

increased the impact of the district court's discretion in sentencing, clarity on this issue is more important than it has ever been in the long history of this circuit split.

CONCLUSION

For the reasons set forth above, this Court should grant a writ of certiorari to review the Court of Appeals' judgment.

Respectfully submitted,

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December 15, 2008

CERTIFICATION

As required by Supreme Court Rule 33.1(h), I certify that the document contains 2960 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 15, 2008.

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